Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

"In re Ronald L. Green"

On Petition for Writ Of Mandamus
To The United States Court of Appeals
For the Ninth Circuit
Before Browing, Leavy and Hawkins,
Circuit Judges,
In Case No. 02-16870,
Ronald L. Green v. John E. Potter,

PETITION FOR A WRIT OF MANDAMUS (CORRECTED)

RONALD L. GREEN
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QUESTIONS PRESENTED FOR REVIEW

1. When a Court of Appeals affirms a decision by a Federal district court that does not provide the judicial trial *de novo* required under the Civil Rights Act of 1964 and the Rehabilitation Act of 1973 but instead applies res judicata based upon an administrative decision that dismissed the case for lack of subject matter jurisdiction and did not consider the properly raised discrimination claims, should the Supreme Court issue a writ of mandamus to compel compliance?

2. When the undisputed facts indicate a Federal agency has a policy that unlawfully discriminates against disabled applicants, the agency conducts a psychiatric examination that is prohibited by law and the agency bases an adverse employment decision on a former employee's protected activity, after administrative and judicial officers overlook the law clearly stated under Supreme Court mandates and the controlling statutes, should the Supreme Court issue a writ of mandamus to compel compliance?

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS

Ronald L. Green v. Jack E. Potter, Case No. 02-16870, Order dated January 7, 2004 (9th Cir. 2004). (Page A-1).

Ronald L. Green v. Jack E. Potter, Case No. 02-16870, Memorandum dated August 1, 2003 (9th Cir. 2003). (Page A-3).

Ronald L. Green v. Jack E. Potter, DC No. CV-S-0155-LRH (RJJ), Order of the United States District Court for the District of Nevada dated August 21, 2002. (See page A-6).

Ronald L. Green v. William J. Henderson, DC No. CV-S-98-1130-JBR, Order of the United States District Court for the District of Nevada dated July 21, 1999. (See page A-15).

Ronald L. Green v. U.S. Postal Service, No. 98-3349, 194 F.3d 1330, 1999 WL 127499, 1999 U.S. App. LEXIS 3748 (Fed. Cir. March 9, 1999). (See page A-19).

Ronald L. Green v. U.S. Postal Service, Case No. SF-0353-98-0372-I-1 Initial (and Final) Decision of the Merit Systems Protection Board dated June 19, 1998. (See page A-46).

STATEMENT OF THE BASIS OF JURISDICTION

On August 1, 2003, the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") issued a Memorandum affirming the United States District Court for the District of Nevada ("district court") granting summary judgment for the United States Postal Service ("Postal Service") and against the petitioner on his claims of discrimination under the Civil Rights Act of 1964, as amended ("Civil Rights Act or Title VII") under 42 U.S.C.S. § 2000e-3 and 42 U.S.C.S. § 2000e-16, and the Rehabilitation Act of 1973, as amended ("Rehabilitation Act") under 29 U.S.C.S. § 794, et al.

The petitioner timely filed a Petition for Rehearing En Banc. On January 7, 2004, the Ninth Circuit denied the Petition for Rehearing En Banc. This action was filed within 90 days of the denial of the Petition for Rehearing En Banc under 28 U.S.C.S. § 1651(a) for an extraordinary writ of mandamus.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

U.S. Const. amend. I

U.S. Const. amend. V

5 U.S.C.S. § 7702.	Actions involving discrimination.
5 U.S.C.S. § 7703.	Judicial review of decisions of the Merit Systems Protection Board.
5 U.S.C.S. § 8128.	Review of award.
5 U.S.C.S. § 8151.	Civil service retention rights.
29 U.S.C.S. § 705.	Definitions.
29 U.S.C.S. § 794.	Nondiscrimination under Federal grants and programs.
29 U.S.C.S. § 794a.	Remedies and Attorneys' Fees.
42 U.S.C.S. § 2000e-2.	Unlawful employment practices.
42 U.S.C.S. § 2000e-3.	Other unlawful employment practices.
42 U.S.C.S. § 2000e-5(f)(3).	Enforcement provisions.
42 U.S.C.S. § 2000e-16.	Nondiscrimination in Federal Government employment.

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5 C.F.R. § 302.202. Qualification requirements.

5 C.F.R. § 302.303. Maintenance of employment lists.

5 C.F.R. § 302.501. Entitlement.

5 C.F.R. § 339.301(c). Authority to require an examination.

5 C.F.R. § 339.303. Examination procedures.

5 C.F.R. § 353.104. Notification of rights and obligations.

5 C.F.R. § 353.301(b). Restoration rights, Fully recovered after 1 year.

5 C.F.R. § 1201.3. Appellate jurisdiction.

29 C.F.R. § 1630.2. Definitions.

29 C.F.R. § 1630.10. Qualification standards, tests, and other selection criteria:

29 C.F.R. § 1630.13. Prohibited medical examinations and inquiries.

U.S. Postal Service Employee and Labor Relations Manual § 546.13, Issue 12, dated 05/01/89.

STATEMENT OF THE CASE

(including the undisputed facts and the procedural history)

1. Petitioner Ronald L. Green ("Green") was terminated from his position of Maintenance Control and Stock Clerk with the Postal Service effective January 7, 1994 due to a compensable on-the-job injury of depression. (See page A-47).

2. The Department of Labor certified Green's depression was caused by, inter alia, employment discrimination.

3. Prior to his termination and during the time of the employment actions at issue, Green actively participated in Equal Employment Opportunity ("EEO" or "Title VII") protected activities. (See page A-7).

4. Green's compensation benefits under the Federal Employees' Compensation Act ("FECA") began on or about April 14, 1994 and ceased on December 15, 1997 when the Department of Labor certified that he had fully recovered from his compensable injury. (See page A-47).

5. Green, a disabled veteran with a 10-point preference eligibility, was entitled to priority consideration for reemployment under the FECA after he timely applied for reemployment on January 2, 1998, within 30 days of the cessation of his compensation benefits. (Id.).

6. The Department of Labor advised the Postal Service on February 17, 1998 that Green had fully recovered from his injury and was able to return to duty. (See page A-50).

7. On February 18, 1998, Postal Service officials circulated an e-mail indicating they would refuse to reemploy him.

8. On February 28, 1998, Green filed an administrative complaint in Case No. SF-0353-98-0372-I-1 before the Merit Systems Protection Board ("Board") regarding the Postal Service's failure to restore his employment as required under the FECA. (See page A-47).

9. Subsequently, Green passed a drug test and a pre-employment physical required by the Postal Service and he was deemed qualified for reemployment. However, the Postal Service states its "standard operating procedure" is to require additional medical examinations by specialists whenever applicants have a history of disability. (See page A-50).

10. According to the Postal Service, because Green has a history of depression that prevented him from working, it required him to submit to a pre-employment psychiatric examination. The Postal Service did not provide any other reason for requiring the psychiatric examination other than Green's history of disability (Id.).

11. No other applicant was required to submit to a psychiatric examination and the agency hired others for the positions it might have placed Green, had it not required that he submit to further medical evaluation. (See page A-49).

12. On June 19, 1998, the Board found "the agency's actions were reasonable under the circumstances, and consistent with its normal practice" and dismissed Case No. SF-0353-98-0372-I-1 for lack of subject matter jurisdiction. (See pages A-47 and A-51).

13. However, the Board also stated it did not consider Green's "affirmative defenses of illegal discrimination, retaliation for prior EEO activity and harmful procedural errors." (See page A-52).

14. On August 10, 1998, Green appealed the sole issue of the Board's jurisdiction to the United States Court of Appeals for the Federal Circuit (Federal Circuit") in Case No. 98-3349. (See pages A-32 and A-33).

15. In March 1999, even though the Federal Circuit found error in the Board's dismissal of Green's complaint for lack of subject matter jurisdiction, the court nevertheless affirmed the decision but did not remand the case to the Board for a decision on the merits. (See page A-31).

16. Facing a "jurisdictional Gordian knot," Green appealed the case to Federal district court in Case No. CV-S-98-1130-JBR where the Postal Service argued that, because the Board did not render a decision on the merits, Green had not exhausted the requisite administrative remedies. (See page A-15 thru A-18).

17. In July 1999 the district court agreed and dismissed Case No. CV-S-98-1130-JBR without prejudice in order to provide the Postal Service an opportunity to process Green's complaint administratively. (See page A-18).

18. On December 16, 1999, despite having received uncontroverted medical reports from the Department of Labor and other qualified physicians that indicated Green had no physical or mental impairment and was able to work, the Postal Service nevertheless required him to submit to another psychiatric examination, but this time by their contract physician, Dr. Norton Roitman ("Dr. Roitman). (See page A-85 thru A-88).

19. Before the examination, Postal Service officials provided Dr. Roitman with documents evidencing Green's prior Title VII protected activity. (See page A-70 and A-71).

20. As a result of his examination, Dr. Roitman confirmed and reported that Green had indeed fully recovered from the prior depression. (See page A-76). However, Dr. Roitman also reported that:

> The reticence the (Postal Service) has to rehire a person who may drain administrative resources away from the mission of the agency is understandable. Therefore the decision to rehire in some ways represents the commitment to keep on someone with the sophistication to attack structures and practices. (See page A-81).

21. Dr. Roitman diagnosed Green with a Narcissistic Personality Disorder ("NPD") and opined that NPD actually caused Green's prior depression and allegedly NPD causes Green to engage in protected activities. Based on the diagnosis

of NPD, the Postal Service refused to rehire Green. (See pages A-8 and A-78).

22. On January 27, 2000, the Postal Service provided Green a right-to-sue letter regarding the agency's refusal to rehire him without a pre-employment psychiatric examination.

23. Green refiled his complaint on February 7, 2000 in district court Case No. CV-S-00-0155-LRH alleging the Postal Service's requirement for a pre-employment psychiatric examination violated the anti-discrimination provisions of the Rehabilitation Act, the anti-retaliation provisions of Title VII, and his rights under the FECA. (See page A-8).

24. On August 25, 2000, Green filed a formal EEO complaint with the Postal Service alleging the agency's failure to rehire him based on the diagnosis of NPD was discriminatorily based on a perceived disability and in retaliation for his prior EEO protected activity.

25. On September 1, 2000, after a full psychological evaluation, Dr. Marv A. Glovinsky ("Dr. Glovinsky"), an independent board certified psychiatrist reported Green did not have NPD. Nevertheless, the Postal Service still refused to rehire Green. (See page A-85 thru A-99).

26. In October 2000, the Postal Service provided Green a right-to-sue letter regarding the agency's refusal to rehire him because of the diagnosis of NPD.

27. In January 2001, Green filed Case No. CV-S-01-0071-KJD in district court and alleged the Postal Service's refusal to rehire him based on the diagnosis of NPD violated the anti-discrimination provisions of the Rehabilitation Act, the anti-retaliation provisions of Title VII, and his rights under the FECA. (See page A-8).

28. The cases involving the Postal Service's refusal to rehire Green without a pre-employment psychiatric examination (Case No. CV-S-00-0155-LRH) and the case involving the agency's refusal to rehire him based upon the

diagnosis of NPD (Case No. CV-S-01-0071-KJD) were consolidated in September 2001. (See page A-8).

29. In February 2002, the Postal Service moved for summary judgment arguing (1) Green allegedly could not establish a prima facie case of disability discrimination because he did not currently suffer from a disability, and (2) based upon the Board's finding that the requirement for the psychiatric examination was "reasonable in the circumstances," Green allegedly could not demonstrate a prima facie case of retaliation because he was precluded from demonstrating it was pretextual. (See page A-10).

30. Green's opposition and countermotion for partial summary judgment argued that preclusion did not apply to his Title VII and Rehabilitation Act claims. (See page A-7).

31. Green also argued that he was entitled to judgment as a matter of law because the Postal Service's policy of requiring additional medical examinations for applicants with a history of disability was discriminatory on its face, and because he was a "qualified individual with a disability" based upon his history of disability and the Postal Service's perception of NPD as a disability. (See pages A-10 thru A-12).

32. Nevertheless, in August 2002 the district court granted summary judgment for the Postal Service and against Green. The district court found, inter alia, "the elements of res judicata are established . . . res judicata precludes (Green) from further establishing that the Postal Service's articulated reason for the psychiatric exam was a pretext for unlawful discrimination." (See pages A-11 thru A-12).

33. On September 20, 2002 Green appealed the district court's decision to the Ninth Circuit in Case No. 02-16870. A panel of the Ninth Circuit issued a three page Memorandum on August 1, 2003 that affirmed the district court but did not address Green's statutory right to a judicial trial *de novo*. (See pages A-3 thru A-5).

34. On September 12, 2003 Green filed a petition for rehearing en banc. The panel of the Ninth Circuit issued an

order on January 7, 2004 modifying the previous Memorandum but nevertheless still affirming the district court, not addressing Green's statutory right to a judicial trial *de novo* and denying the petition for rehearing en banc. (See pages A-1 thru A-2).

35. To date, the Postal Service has not restored or provided any of the rights and benefits of employment Green is entitled to under the FECA.

SUMMARY OF THE ARGUMENT

This petition for a writ of mandamus is necessary because the administrative and judicial officers below were misguided by the Postal Service into overlooking their fundamental and ethical duty to follow the controlling law and apply it to the undisputed facts in this case. Instead, they deferred to clearly erroneous and misleading arguments made by agency and neither the administrative nor the judicial officers below considered the merits of Green's discrimination claims.

The Ninth Circuit and the district court misapplied res judicata and collateral estoppel, not only because the discrimination claims were entitled to a judicial trial *de novo* under the Civil Rights Act and the Rehabilitation Act, but also because the requirements for preclusion were not met.

The undisputed facts indicate that (1) the Postal Service has an admitted policy that unlawfully discriminates against disabled applicants, (2) due to the discriminatory policy, Green's restoration rights were denied when other persons were hired in his place, (3) the Postal Service subjected Green to an intrusive, prohibited and unlawful psychiatric examination, and (4) the Postal Service refused to rehire Green because he engaged in protected activity.

Mandamus is the only means available to stop the Postal Service's continuing discriminatory policy against individuals with disabilities, to prevent the violation of Green's Constitutional rights to due process and equal protection, and to provide the relief that cannot be obtained in any other form or from any other court.

THE ARGUMENT

This is an extraordinary case because the facts giving rise to the Postal Service's liability for unlawful disability discrimination and retaliation have been virtually undisputed since the beginning of the case. Nevertheless, the Postal Service has refused to resolve the matter and has escaped liability by manipulating and obfuscating the EEO process and the application of the law in the courts below.

I. A JUDICIAL TRIAL *DE NOVO* WAS REQUIRED BY LAW BUT NOT PROVIDED.

In cases involving discrimination, the Civil Service Reform Act ("CSRA") clearly provides "any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the (Board) may obtain judicial review of the order or decision" and "shall have the right to have the facts subject to trial *de novo* by the reviewing court." (5 U.S.C.S. § 7703(a)(1); 5 U.S.C.S. § 7703(c)(3); University of Tennessee v. Elliott, 478 U.S. 788, 793, (1986)). (internal citations omitted here and for all citations below).

This Honorable Court has also mandated that Federal-sector employees (and applicants for employment like Green) are entitled by § 717(c) of the Civil Rights Act of 1964 (Act), 42 U.S.C.S § 2000e et seq., to file a civil action as provided in § 706 of the Act, as codified at 42 U.S.C.S. § 2000e-5. The civil action provided in § 706 of the Act is a trial *de novo*." (Chandler v. Roudebush, et. al, 425 U.S. 840, 845-862 (1976)

Indeed, even if the absence of discrimination was affirmatively established by the clear weight of the evidence contained in the administrative record, a Federal-sector applicant, like Green, is still entitled to a judicial trial *de novo*. (Id.).

Moreover, the remedies, procedures and rights set forth in Title VII and the Civil Rights Act (42 U.S.C.S. § 2000e-16) are also available for Green's claims under the Rehabilitation Act of 1973. (29 U.S.C.S. § 794a).

And finally, this Honorable Court has clearly stated neither res judicata nor collateral estoppel can apply to administrative decisions when "a statutory purpose to the contrary is evident." (Astoria Federal Savings & Loan Association v. Solimino, 501 U.S. 104, 108, (1991)).

When Green first appealed his discrimination claims to district court, the Postal Service successfully argued that because the Board dismissed the case for lack of jurisdiction, those administrative proceedings were essentially null and void and Green was still required to process his complaint administratively before the Postal Service prior to proceeding to district court. (See page A-15 thru A-18).

However, after the Postal Service completed its administrative processing and provided the right-to-sue letter to Green, the agency then argued that the Board's decision precluded Green's discrimination claims. (See page A-10).

Based upon dicta in the Board's administrative decision, the district court accepted the Postal Service's argument and determined res judicata precluded Green from establishing the Postal Service's articulated reason for the psychiatric examination was a pretext for discrimination.

On the same basis, the district court determined the Postal Service had not taken an adverse employment action against Green and he could not show the Postal Service's refusal to rehire him based on the diagnosis of NPD was a pretext for discrimination. The Ninth Circuit re-characterized the preclusion as collateral estoppel and affirmed the decision.

To support preclusion, the Ninth Circuit initially cited Owens and later cited Offshore Sportswear. In Owens, res judicata was applied, and in Offshore Sportswear, collateral estoppel was applied, after those appellants filed consecutive suits in district court. (Owens v. Kaiser Found. Health Plan,

Inc., 244 F.3d 708, 714 (9th Cir. 2001); Offshore Sportswear, Inc. v. Vuarnet Intern., B.V., 114 F.3d 848, 850 (9th Cir. 1997)). However, neither case involved discrimination claims or a statutory scheme that required a judicial trial *de novo* following administrative proceedings.

However, in the instant case, and as required by Title VII and the Rehabilitation Act, Green properly filed an administrative complaint raising his discrimination claims before the Board in order to exhaust his administrative remedies before proceeding to district court where those same statutes require a judicial trial *de novo*. (Sloan v. West, 140 F.3d 1255, 1260 (9th Cir. 1998); See Green v. Henderson, Case. No. CV-S-98-1130-JBR (1999) at pages A-15 thru A-18).

Opponents to this petition may argue that the Federal Circuit provided *do novo* review. However, notwithstanding the fact that the Federal Circuit's review was not a judicial **trial** *de novo*, the only issue before the Federal Circuit was whether the Board had subject matter jurisdiction. (See pages A-22 and A-32). Moreover, the Federal Circuit does not have jurisdiction to review the merits of claims involving discrimination and was required to remand the case for a decision on the merits. (5 U.S.C.S. § 7703(b); Federal Circuit's Guide for Pro Se Petitioners at A-38 and A-39).

Because the Supreme Court and the governing statutes provide clear and unambiguous language that entitles Green to a judicial trial *de novo* for his discrimination claims and the courts below improperly precluded his claims based on dicta found in the administrative record, the Ninth Circuit and the district court erred as a matter of law and denied Green due process and equal protection under the law.

II. Discrimination claims and issues were erroneously precluded and even the requirements for res judicata and collateral estoppel were not met.

Res judicata applies when there is: "(1) an identify of claims; (2) a final judgment on the merits; and (3) identity or privity between the parties." (Owens at 713).

"To foreclose relitigation of an issue under collateral estoppel: (1) the issue at stake must be identical to the one alleged in the prior litigation; (2) the issue must have been actually litigated in the prior litigation; and (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in the earlier action." (Clark v. Bear Stearns & Co., Inc., 966 F.2d 1318, 1320 (9th Cir. 1992)).

However, this Honorable Court has also mandated that preclusion is "inappropriate where ( ) parties have not had a full and fair opportunity to fully litigate the merits of an issue." (Allen v. McCurry, 449 U.S. 90, 94-95 (1980)).

Even though the prior analysis clearly shows Green should have received a judicial trial *de novo* in district court even if his discrimination claims had been fully litigated in the Board's administrative proceedings, the undisputed facts indicate they were not.

The Board determined that it lacked subject matter jurisdiction and dismissed Green's mixed case complaint (See page A-47). Moreover, the Board did not consider Green's "affirmative defenses" of illegal discrimination and retaliation even though there was no allegation of misconduct on his part that he was required to defend. (See page A-52).

Nevertheless, this decision by the Board is the basis used by the Ninth Circuit and the district court to preclude Green's discrimination claims.

Clearly the district court erred in applying res judicata because there was no identity of claims and there was no final judgment on the merits since the Board dismissed the

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case for lack of subject matter jurisdiction and did not consider Green's claims of illegal discrimination and retaliation. The Ninth Circuit apparently recognized the district court's error because it re-characterized the preclusion as collateral estoppel. (See pages A-2 and A-4).

However, it was also error to apply collateral estoppel because none of the discrimination issues involving pretext or an adverse employment action were identical to anything actually litigated and determined by the Board. And they were certainly not a critical and necessary part of the judgment since they were not even addressed by the Board.

By its own admission, the Board did not consider any issue regarding discrimination even though it was required to do so under 5 U.S.C.S. § 7702(a)(1) and was therefore obtained without procedures required by law.

Although the Board made no such findings, the courts below accepted the inferences drawn by the Postal Service that because the Board found the Postal Service's articulated reason for requiring the pre-employment psychiatric examination for Green and not others was "reasonable in the circumstances, and consistent with its normal practice," the requirement was therefore "legitimate" and not "pretextual" and not an "adverse employment action."

However, according to this Honorable Court, unlawful discrimination may be established by policies and practices that appear neutral on their face and intent but that nonetheless discriminate in effect. (General Electric Co. v. Gilbert, 429 U.S. 125, 137 (1976); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n. 14 (1973)).

Therefore, the Board's finding that the psychiatric examination was "reasonable in the circumstances" would not prevent Green from establishing the Postal Service's articulated reason is discriminatory on its face or pretextual, designed to mask unlawful retaliation, and an adverse employment action. (Id.: Montana v United States, 440 U.S. 147, 153 (1979)).

To support preclusion based on collateral estoppel the Ninth Circuit cites Offshore Sportswear where there was no *final decision on the merits of the underlying claims.*

In Offshore Sportwear, the appellants filed two consecutive suits in district court but only filed an appeal after the second suit was dismissed.

In the first action, the district court determined it could not exercise jurisdiction over the underlying action due to the forum selection clause that was contained in an agreement between the parties. The court dismissed the action without prejudice so the aggrieved could refile in the proper forum. However, the case was refiled in the same court. (Offshore Sportswear at 850).

Unlike Offshore Sportswear where the court's jurisdiction was again put in issue in the second suit, the Board dismissed Green's administrative case for lack of subject matter jurisdiction but he did not refile his case with the Board.

Green properly appealed to the district court, the proper forum for his underlying claims as provided under 5 U.S.C.S. §§ 7702(a)(3) and 7703(b)(2) and (c), where that court had jurisdiction pursuant to § 717 of the Civil Rights Act and § 501 of the Rehabilitation Act and Green had a right to a judicial trial *de novo*.

In addition, unlike Offshore Sportswear where the claimants received judicial review in the first instance, the CSRA provides administrative findings or conclusions of the Board that are found to be not in accordance with law or obtained without procedures required by law, must be held unlawful and set aside after judicial review. (5 U.S.C.S. § 7702(c)).

Accordingly, neither res judicata nor collateral estoppel can apply in these circumstances even absent the statutory provisions of Title VII, the Rehabilitation Act and the CSRA for a judicial trial *de novo* because Green never had a full and fair opportunity to fully litigate the merits of the discrimination issues in a court of competent jurisdiction.

III. THE UNDISPUTED FACTS INDICATE GREEN IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

Under the McDonnell Douglas burden-shifting test, a plaintiff alleging discrimination must first establish a prima facie case. The defendant must then articulate a legitimate non-discriminatory reason for the acts alleged to be discriminatory. If the defendant does so, the plaintiff must present evidence that the articulated reason was pretextual, designed to mask actual discrimination. (McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).

When a defendant employer fails to meet its burden to articulate a legitimate non-discriminatory reason for the alleged discriminatory acts, the court must award judgment to the plaintiff as a matter of law. (St. Mary's Honor Center v. Hicks, 509 U.S. 502, 509 (1993).

However, the McDonnell Douglas burden-shifting test is inapplicable where the plaintiff presents direct evidence of discrimination. (Teamsters v. United States, 431 U.S. 324, 358, n. 44 (1977); Snead v. Metro. Prop. & Cas. Ins. Co., 237 F.3d 1080, 1093 n. 10 (9th Cir. 2001); Mustafa v. Clark County School District, 157 F.3d 1169, 1175-76 (9th Cir. 1998)).

Therefore, if the Postal Service fails to articulate a legitimate non-discriminatory reason for subjecting Green to a pre-employment psychiatric examination not required of other applicants, or if he presents direct evidence of discrimination, Green is entitled to judgment as a matter of law.

A. The Postal Service's articulated reason for requiring the pre-employment psychiatric examination for Green was discriminatory on its face.

Under the Rehabilitation Act, the Postal Service is specifically prohibited from discriminating against an otherwise qualified individual with a disability by reason of her or his disability. (29 U.S.C.S. § 794).

In addition, it is unlawful for the Postal Service to use selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities. (29 C.F.R. § 1630.10).

An "individual with a disability" means any person who:

(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities;

(ii) has a record of such an impairment; or

(iii) is regarded as having such an impairment.

(29 U.S.C.S § 705(20)(B); 29 C.F.R. § 1630.2(g)).

"Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities." (29 C.F.R. § 1630.2(k)).

Green established a prima facie case of disability discrimination. He is disabled within the meaning of the Rehabilitation Act because it is undisputed he has a record of mental impairment (depression) that the Secretary of Labor certified substantially limited his ability to work from April 14, 1994 until December 15, 1997. (Lucero v. Hart, 915 F.2d 1367, 1371 (9th Cir. 1990)).

Green was able to perform the essential functions of the job because it is undisputed the Department of Labor certified he had fully recovered and was otherwise qualified for re-employment and after he passed a drug test and a pre-employment physical, the Postal Service also determined he was otherwise qualified for reemployment. (Id.).

The Postal Service acted adversely against Green solely because of his disability because it is undisputed the agency required a psychiatric examination for Green only because he had a history of disability and it hired others in his place. (Id.; Zukle v. Regents of Univ. of Cal., 166 F.3d 1041, 1045 (9th Cirl 1999)).

The Ninth Circuit and the district court concluded Green could not establish a prima facie case because he allegedly could not show he was disabled within the meaning of the Rehabilitation Act because he does not currently suffer from a mental impairment that substantially limits a major life activity. (See Page A-13).

However, the law says an individual is also disabled within the meaning of the Rehabilitation Act if he has a record of impairment. (29 U.S.C.S. § 705(20)(B); 29 C.F.R. § 1630.2(g)). And a record of impairment includes a history of mental impairment that substantially limits the ability to work. Here, the Postal Service admits it singled Green out only because he had a history of disability (depression).

In addition, the Supreme Court clearly stated, "Congress intended (the Rehabilitation Act) to protect against discrimination against a 'person who has a record of, or is regarded as having, an impairment (but who) may at present have no actual incapacity at all." (School Board v. Arline, 480 U.S. 273, 107 S. Ct. 1123, 1126-1127, (1987)).

The Ninth Circuit relies on Zukle v. Regents. However, in Zukle, that court determined that the plaintiff-appellant was not an "otherwise qualified" individual with a disability under the Rehabilitation Act because she could not meet certain minimum standards for the position she was seeking, with or without reasonable accommodation. (Zukle v. Regents of the Univ. of Cal., 166 F.3d 1041, 1045 (9th Cir. 1999)).

Here, it is undisputed that Green passed the required drug test and physical examination and was otherwise qualified for reemployment at the time the Postal Service required him to submit to a pre-employment psychiatric examination that was not required of other applicants.

In addition, under the disparate impact analysis, a qualified individual with a disability need only prove that a stated employment practice disadvantages disabled applicants. (29 U.S.C.S. § 794; 29 C.F.R. § 1630.10).

By its own admission, the Postal Service targets the protected class of applicants with a history of disability and subjects the class to additional intrusive medical scrutiny that is not required of other applicants only because they have a history of disability. (See page A-50)

The Postal Service's admitted practice of requiring additional medical examinations only when applicants belong to the protected class of individuals with a history of disability is discriminatory on its face and a direct violation of 29 U.S.C.S. § 794 and 29 C.F.R. § 1630.10 under the Rehabilitation Act.

The Civil Rights Act would prevent the Postal Service from requiring only black applicants to take a literacy test and the Rehabilitation Act prevents it from requiring only applicants with a history of disability to undergo additional medical examinations.

Therefore, as set forth by this Court in St. Mary's Honor Center, because the Postal Service did not articulate a legitimate non-discriminatory reason for the pre-employment psychiatric examination, Green is entitled to judgment as a matter of law.

In addition, because the practice screens out or tends to screen out the protected class of individuals with a history of disabilities, it violates 29 U.S.C.S. § 794 and 29 C.F.R. § 1630.10 under the Rehabilitation Act and again, Green is entitled to judgment as a matter of law.

B. Green's restoration rights were denied because other persons were hired in his place.

It is undisputed that Green is covered by 5 U.S.C.S. § 8101(1) and he is entitled to priority consideration for reemployment. The procedures require the former agency place the employee on a priority reemployment list and give him priority consideration over certain other job applicants. (5 C.F.R. § 302.303(b); 5 C.F.R. § 302.304(a).

Incredibly, the Ninth Circuit and the district court accepted the Postal Service's argument that because it has allegedly still not made a decision regarding Green's January 2, 1998 application for reemployment, allegedly Green cannot show that he suffered an adverse action and that his restoration rights were denied even though the Postal Service has continued to hire others with less priority in his place since 1998.

In Kortan, as cited by the Ninth Circuit, the plaintiff-appellant contended the adverse employment action occurred when her alleged sexual harasser stood outside her door and laughed, saying "she got me on sexual harassment charges." (Kortan v. Cal. Youth Auth., 217 F.3d 1104, 1112-13 (9th Cir. 2000)).

That court determined it was not an adverse employment action because it was not possible to infer that the conduct would continue without sanction, create a hostile work environment and Kortan had no choice but to quit. (Id.).

However, in this case, Green was clearly subjected to an adverse employment action based upon the undisputed fact that the Postal Service hired others with less priority when he was entitled to priority consideration. (5 C.F.R. § 302.501).

A "failure to hire" is one of the few adverse employment actions specifically enumerated in the statutes. (42 U.S.C.S. § 2000e-2(a)(1)). It is undisputed that the Postal Service failed to hire Green and hired others in his place.

Therefore, Green suffered an adverse employment action because the Postal Service refused to reemploy him even though he was entitled to priority consideration when he applied in January 1998 and the Postal Service hired and continues to hire others with less priority in his place.

C. The Postal Service subjected Green to an intrusive, prohibited and unlawful psychiatric examination.

As set forth above, the Postal Service's requirement that Green submit to a psychiatric examination only because he has a history of depression is discriminatory on its face and a direct violation of the Rehabilitation Act. However, the requirement and the actual examination conducted on behalf of the Postal Service were prohibited and unlawful on other grounds as well.

Under the FECA, the actions of the Secretary of Labor or his designee in allowing or denying compensation benefits are "final and conclusive for all purposes and with respect to all questions of law and fact and not subject to review by another official of the United States or by a court by mandamus or otherwise." (5 U.S.C.S. 8128(b)).

In addition, under the Rehabilitation Act, the Postal Service is prohibited from conducting medical examinations or making inquiries as to whether an applicant is an individual with a disability or as to the nature or severity of his disability. (29 C.F.R. § 1630.13; Mustafa v. Clark County School District, 157 F.3d 1169, 1175-76 (9th Cir. 1998)).

Moreover, under OPM's regulations, the Postal Service may order a psychiatric examination only when (1) there is no physical explanation for an individual's behavior or actions which may affect safe and efficient performance or (2) a psychiatric examination is specifically called for in a position. (5 C.F.R. § 339.301(e)(1)).

However, even when authorized under 5 C.F.R. § 339.301(e)(1), a psychiatric examination "may only be used to make legitimate inquiry into a person's mental fitness to successfully perform the duties of his or her position (safely)." (5 C.F.R. § 339.301(e)(2)).

Despite the Department of Labor's certification and medical reports from his treating psychologist and three other specialists that indicated Green had fully recovered from

depression and was able to work, the Postal Service refused to reemploy him unless he submitted to a pre-employment psychiatric examination by their contract physician.

Dr. Roitman's stated purpose for the examination was to establish the status of Green's mental health and to determine the "authenticity of the prior mental illness" and the "amelioration of that condition." (See page A-77).

Although he confirmed Green had fully recovered from his compensable on-the-job injury of depression, Dr. Roitman diagnosed Green with NPD and opined that NPD actually caused Green's prior disability and allegedly NPD causes Green to engage in protected activities. (See page A-81)

Because the Secretary of Labor has exclusive jurisdiction to determine the nature of Green's compensable injury and his subsequent full recovery, Dr. Roitman, an agent of the Postal Service, cannot substitute his judgment for the Secretary's certification that Green's prior depression was caused by accepted factors of his employment. (5 U.S.C.S. § 8128(b)).

In addition, the Department of Labor's termination of his disability payments because Green was no longer disabled established a prima facie case of full recovery and the pre-employment psychiatric examination was unnecessary to invoke Green's restoration rights. (Brumley v. Pena, 62 F.3d 277, 279 (8th Cir. 1995); 5 U.S.C.S. § 8151(b)(2)).

Moreover, because Dr. Roitman reported Green's prior disability was caused by an alleged personality disorder and Dr. Roitman sought to determine the "amelioration" of Green's prior disability, it is clear Dr. Roitman conducted the prohibited medical examination and made unlawful inquiries on behalf of the Postal Service in order to determine the nature and severity of Green's disability in violation of the Rehabilitation Act. (29 C.F.R. § 1630.13).

Furthermore, ordering a psychiatric examination only because Green has a history of disability is not one of the permissible justifications for a psychiatric examination under 5 C.F.R. § 339.301(e)(1)).

In addition, the report issued by Dr. Roitman clearly establishes it was not used to determine if Green could safely perform the duties of any position as required by 5 C.F.R. 339.301(e)(2). Instead, Dr. Roitman was concerned with whether Green would continue his "activism and advocacy" and "drain administrative resources" by engaging in protected activities. (See page A-81). Although he recognized that it might be unlawful, one option Dr. Roitman suggested was "to put limitations on (Green's) grievances, appeals and filings as a condition for reemployment." (Id.)

The Ninth Circuit and the district court deferred to the Board's finding that the Postal Service had the discretion under 5 C.F.R § 302.303(a)(2) to condition Green's reemployment on a pre-employment psychiatric examination provided it makes the conditions a matter of record and applies the policy uniformly to all eligible employees. (See pages A-48 and A-51).

However, no evidence was presented and no finding was made by the Board that the condition of requiring additional medical examinations by specialists whenever applicants have a history of disability was a "matter of record."

On the contrary, when Green requested the Postal Service identify the rules and regulations governing its actions, the Postal Service complained Green was unduly delaying the process. (See page A-48). The Board and the Federal Circuit agreed and criticized Green for making the requests and the Postal Service was never required to identify any such rule or regulation. (See pages A-31 and A-51).

Nevertheless, the Postal Service had an affirmative duty to notify Green of his rights, obligations, and benefits. (5 C.F.R. § 353.104). In addition, the Postal Service is required to "make its standards a matter of record in the appropriate office of the agency, and (to) furnish information concerning the standards for a position to an applicant on his/her request." (5 C.F.R. § 302.202).

Moreover, and specifically when it comes to ordering medical examinations, the Postal Service is required to inform an applicant, like Green, in writing of its reasons for doing so and the consequences of a failure to cooperate, which it did not do. (5 C.F.R. § 339.303(a)).

For these reasons, and contrary to the conclusions reached by the Board and the Federal Circuit, any delay in the rehiring process was not caused by Green exercising his civil rights but rather because the Postal Service's failed to fulfill its lawful obligations.

And finally, the Postal Service's stated policy of requiring additional medical examinations whenever applicants have a history of disability by itself conclusively shows that the Postal Service did not "apply its policy uniformly to all eligible employees" because only the protected class of "individuals with a history of disability" were subjected to it.

Therefore, it is clear the Postal Service did not have the discretion under 5 C.F.R § 302.303(a)(2) to require a psychiatric examination for Green based solely on his history of disability because the condition was not a matter of record and it was not applied uniformly to all applicants.

However, it is worthy to note that the Board misapplied "Agency Discretion" under 5 C.F.R. § 302.303(a)(2) to the facts of this case when it should have applied "Agency Obligation" under the preceding section, 5 C.F.R. § 302.303(a)(1).

Because Green was a preference eligible who applied for reemployment as provided in 5 C.F.R. § 302.303(b)(1), the Postal Service was obligated to put him on a priority reemployment list, without conditions, and rehire him when a vacancy became available. (5 C.F.R. § 302.303(a)(1); Postal Service Employee and Labor Relations Manual § 546.13, Issue 12, dated 05/01/89 at page A-68).

Therefore, as demonstrated above, the Postal Service did not have the discretion to require a pre-employment psychiatric

examination for Green only because he has a history of depression. (5 C.F.R. § 302.303(a)(1) and (2); 5 C.F.R. § 339.301(e); 29 C.F.R. §§ 1630.10 and 1630.13).

To compound the error and the injuries to Green, the psychiatric examination was used by the Postal Service to make impermissible inquiries into the nature and severity of Green's prior disability in violation of OPM's regulation at 5 C.F.R. § 339.301(e)(2), the Secretary of Labor's exclusive jurisdiction under 5 U.S.C.S. § 8128, and the anti-discrimination provisions of 29 U.S.C.S. § 794 of the Rehabilitation Act.

D. Green was not hired because he engaged in protected activities.

It is an unlawful employment practice for the Postal Service to discriminate against any employees or applicants because of their Title VII protected activities. (42 U.S.C.S. § 2000e-3).

After the Postal Service provided him with documents evidencing Green's prior Title VII protected activity, Dr. Roitman determined that NPD causes Green to engage in those activities. Dr. Roitman recognized the "reticence the (Postal Service) has to rehire (Green) who may drain administrative resources." (See pages A-71 and A-81)

A thorough review of Dr. Roitman's report indicates that, stripped of Green's protected activities, or what he called Green's "activism and advocacy," Dr. Roitman had no other basis for the "difficulties" he alleged between Green and the Postal Service. (Id).

Clearly, Green's protected activity was a motivating and determinative factor in the Postal Service requirement for the pre-employment psychiatric examination and the resulting diagnosis of NPD, and therefore a direct violation of the anti-retaliation provisions of Title VII. (5 U.S.C.S. § 2000e-3).

As outlined above, the diagnosis of NPD resulted from an unlawfully discriminatory psychiatric examination that was also prohibited by the FECA, the OPM, and based on Green's

EEO protected activity. It was therefore "fruit from the poisonous tree" and also unlawful.

In addition, there is a genuine issue of material fact as to whether Green has NPD because all previous and one subsequent medical report indicated no NPD. (See pages A-70 thru A-84). Nevertheless, because the Postal Service continues to refuse to rehire Green based on NPD, Green does not have the burden to show NPD is a disability, as required by the Ninth Circuit and the district court.

Under 29 C.F.R. § 1630.10, the Postal Service has the burden to show the alleged NPD prevents Green from performing the essential functions for any job he is otherwise qualified for and it could not reasonably accommodate the alleged NPD. (29 U.S.C.S. § 794; 29 C.F.R. § 1630.10; Mustafa v. Clark County Sch. Dist., 157 F.3d 1169, 1176 (9th Cir. 1998); Prewitt v. U.S. Postal Service, 662 F.2d 292, 306 (5th Cir. 1981)).

IV. THE WRIT OF MANDAMUS WILL AID IN THE COURT'S APPELLATE JURISDICTION IN EXCEPTIONAL CIRCUMSTANCES WHERE ADEQUATE RELIEF CANNOT BE OBTAINED IN ANY OTHER FORM OR FROM ANY OTHER COURT.

Mandamus is the appropriate remedy to control actions of Federal courts in civil cases especially as here where the courts have not followed the Supreme Court mandates and the controlling statutes. (57 L.Ed. 2d 1203).

These are indeed exceptional circumstances. As set forth above, the Board, the Federal Circuit, the district court and the Ninth Circuit clearly failed to follow and apply the controlling law to the discriminatory acts in this case.

The Board failed to consider the discrimination claims at issue and the Federal Circuit failed to remand the case to the Board for a decision on the merits after it determined the Board had subject matter jurisdiction. The Federal Circuit then exceeded its jurisdiction by considering the merits of a case involving unlawful discrimination. Then, the district

court and the Ninth Circuit failed to provide the judicial trial de novo required under the statutes and failed to follow and apply the law.

We can't image a case where unlawful discrimination is more clearly demonstrated. The undisputed facts and evidence clearly show the Postal Service engaged in unlawful disability discrimination and retaliation against the petitioner and he is entitled to judgment as a matter of law.

The most disturbing aspect of this case is the fact that the courts below sanctioned the Postal Service's use of an unlawful psychiatric examination to question and criticize Green for exercising his Constitutional and statutory rights.

We empathize with the courts' ever increasing caseload but the remedy is not to ignore the law, including their own precedents, and deny due process and equal protection for injured citizens or allow government defendants to manipulate the system.

By compelling the courts below to comply with the law, the writ of mandamus will aid the Court's appellate jurisdiction by correcting the erroneous decisions produced below that were clearly contrary to the controlling law and thereby minimize the confusion and additional casework to follow.

The Petition for Rehearing En Banc was summarily denied. All other attempts for relief, both formal and informal have been unsuccessful or ignored.

This Honorable Court is the only forum that can restore the Rule of Law and the integrity to the EEO complaint process by compelling the courts below to provide the Constitutional and statutory rights previously denied.

CONCLUSION AND REQUEST FOR RELIEF

WHEREFORE, because the undisputed facts and controlling law clearly demonstrate he was denied the requisite judicial trial *de novo* and he is entitled to judgment as a matter of law, the petitioner respectfully requests this Honorable Court grant this petition and order the Ninth Circuit to vacate the August 1, 2003 Memorandum and January 7, 2004 Order in Case No. 02-16870 that affirmed the judgment of the district court in Case No. CV-S-00-0155-LRH, and for the Ninth Circuit to issue a new order reversing the judgment of the district court and granting summary judgment for the petitioner on all claims, or in the alternative, order a judicial trial *de novo*.

I declare under penalty of perjury that the foregoing is true and correct.

RESPECTFULLY SUBMITTED

this 4th day of June, 2004.



Ronald L. Green

Petitioner, *In Proper Person*

APPENDIX

APPENDIX

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2.	*Ronald L. Green v. Jack E. Potter,* Case No. 02-16870, Memorandum dated August 1, 2003 (9th Cir. 2003).	A-3
3.	*Ronald L. Green v. Jack E. Potter,* DC No. CV-S-0155-LRH (RJJ), Order of the United States District Court of the District of Nevada dated August 21, 2002.	A-6
4.	*Ronald L. Green v. William J. Henderson,* DC No. CV-S-98-1130-JBR, Order of the United States District Court for the District of Nevada dated July 21, 1999. ...	A-15
5.	*Ronald L. Green v. U.S. Postal Service,* No. 98-3349, 194 F.3d 1330, 1999 WL 127499, 1999 U.S. App. LEXIS 3748 (Fed. Cir. March 9, 1999).	A-19
6.	*Petitioner's Statement Concerning Discrimination* dated August 10, 1998.....	A-32
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED JAN 07, 2004

RONALD L. GREEN,
Plaintiff-Appellant,

v.

JOHN E. POTTER,
Defendant-Appellee.

No. 02-16870

D.C. No.
CV-00-00155-LRH/RJJ
Nevada
(Las Vegas)

ORDER

Before: BROWNING, LEAVY, and HAWKINS,
Circuit Judges.

The August 1, 2003 memorandum disposition is amended as follows.

The following language shall replace the second paragraph:

"The district court properly found that Green was collaterally estopped from claiming that the Postal Service's requirement that he undergo the psychiatric evaluation was pretextual. *See Offshore Sportswear, Inc. v. Vuarnet Intern., B.V.* 114 F.3d 848, 850 (9th Cir. 1997) ("Collateral estoppel, or issue preclusion, bars the relitigation of issues actually adjudicated in previous litigation between the same parties.") (internal quotations omitted); *Green v. United States Postal Service,* No. 98-3349, 1999 WL 127499, *4-5 (Fed. Cir. Mar, 9, 1999) (per curiam) (holding that requirement for psychiatric, evaluation was routine when rehiring employees with history of previous mental illness, not inconsistent with normal practices, and reasonable)."

Except for the above amendment, Judge Hawkins has voted to deny appellant's petition for rehearing en banc, and Judges Browning and Leavy so recommend.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

The petition for rehearing en banc is denied.

No further filings will be accepted in this closed appeal.

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* John E. Potter is substituted for his predecessor, William G. Henderson, as Postmaster General of the United States pursuant to Fed. R. App. P. 43(c)(2).

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed AUG-1 2003

RONALD L. GREEN,
Plaintiff-Appellant,
v.
JOHN E. POTTER,*
Defendant-Appellee.

No. 02-16870

D.C. No,
CV-00-00155-LRH/RJJ

MEMORANDUM**

Appeal from the United States District Court
for the District of Nevada
Larry R. Hicks, District Judge, Presiding

Submitted July21, 2003***

Before: BROWNING, LEAVY, and HAWKINS, Circuit Judges.

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* John E. Potter is substituted for his predecessor, William G. Henderson, as Postmaster General of the United States pursuant to Fed. R. App. P. 43(c)(2).

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

*** Because the panel unanimously finds this case suitable for decision Without oral argument, We deny Green's request for oral argument. See Fed. R. App. P. 34(a)(2).

Ronald Green appeals the district court's summary judgment in favor of the Postmaster General in Green's action alleging that the United States Postal Service did not rehire him because he had a history of impairment or because it regarded him as disabled, in violation of the Rehabilitation Act. Green also alleged retaliation, in violation of Title VII. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review *de novo*, *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001) (en banc), and we affirm.

The district court properly determined that res judicata barred Green's claims alleging that the Postal Service discriminated against him by requiring a pre-employment psychiatric examination because he fully litigated this issue before the Merit Systems Protection Board and the United States Court of Appeals for the Federal Circuit. *See Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 714 (9th Cir. 2001) (holding that res judicata precludes further review when there is identity of the claims, a final decision, and identical parties); *Green v. United States Postal Service*, No. 98-3349, 1999 WL 127499, *4-5 (Fed. Cir, Mar. 9, 1999) (per curiam) (unpublished) (holding that requirement for psychiatric examination was routine when rehiring employees with history of prior mental illness, not inconsistent with normal practices, and reasonable).

Summary judgment was proper on Green's retaliation claims because he failed to raise a genuine issue of material fact as to whether his employer took an adverse employment action against him, *see Kortan v. Cal. Youth Auth.*, 217 F.3d 1104, 1112-13 (9th Cir. 2000), or whether

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* John E. Potter is substituted for his predecessor, William G. Henderson, as Postmaster General of the United States pursuant to Fed. R. App. P. 43(c)(2).

requiring him to take a psychiatric examination was otherwise pretextual, *see Bradley v. Harcourt Brace & Co.*, 104 F.3d 267, 270 (9th Cir. 1996).

The district court properly granted summary judgment on Green's Rehabilitation Act claims because he failed to raise a genuine issue of material fact that he was disabled within the meaning of the Act, *see Zukle v. Regents of the Univ. of Cal.*, 166 F.3d 1041, 1045 (9th Cir. 1999), or that his narcissistic personality disorder is a mental impairment that substantially limits one or more major life activities, *see Thorton v. McClatchy Newspapers, Inc.*, 292 F.3d 1045, 1046 (9th Cir. 2002) (order).

AFFIRMED.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

Filed 02 AUG 22

RONALD L. GREEN,
Plaintiff,

CV-S-00-0155—LRH (RJJ)

ORDER

v.

JACK E. POTTER,
Postmaster General,
UNITED STATES POSTAL
SERVICE
Defendant.

Defendant Postmaster General of the United States Postal Service ("Postal Service") filed a Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56 on February 20, 2002. (Docket #55). On March 18, 2002, Plaintiff responded with an Opposition (#57) and a Countermotion for Partial Summary Judgment. (#58). The Countermotion is essentially, a paragraph at the end of Plaintiff's Opposition and because the "motion" fails to conform with Local Rule 7-2(a) requiring a supporting memorandum of points and authorities, will not be considered and is denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff was originally hired by the Postal Service as a Distribution Clerk on or about December 10, 1984. (Amended Complaint, ¶ 3). On or about January 4, 1986, Plaintiff was transferred to the position Maintenance Control and Stock Clerk. (Id. ¶ 5), Beginning in November 1991, Plaintiff began receiving periodic medical leave from the Postal Service on account of his diagnosed depression. (Id. ¶¶ 8 & 9). In 1992, Plaintiff filed his first of many federal suits against the Postal Service, case no. CV-S-92-0344-DAE, alleging violations of Title VII. In 1994, the Postal Service terminated Plaintiff because he remained absent from work for over one year. Plaintiff began receiving workers compensation benefits after his termination on account of his depression and enrolled in law school in the fall of 1994. (Id. ¶ 10)

In 1996, Plaintiff graduated from law school and passed the Nevada bar exam, but did not gain admission to the Nevada Bar Association. Plaintiff blamed his denial of admission to the bar on the Postal Service and filed case number CV-S-97-1333-HDM.

In late 1997, Plaintiff's workers compensation benefits ended when he became employed by the State of Nevada

as a compliance investigator. Thereafter, in early 1998, Plaintiff sought reinstatement at his old job with the Postal Service. The Postal Service sent Plaintiff an application for employment and requested that he undergo a physical examination and psychiatric evaluation. Plaintiff responded with a claim of retaliation and discrimination before the Merit Systems Protection Board that was appealed to the Court of Appeals for the Federal Circuit. While litigating those claims Plaintiff filed a his third Title VII lawsuit, for having to submit to a physical and psychiatric evaluation under the Rehabilitation Act, 29 U.S.C. § 794, based on his previous depression in case number CV-S-98-1130-JBR

In February 2000, Plaintiff filed case number CV-S-00-0155-PMP, relating to a discrimination claim for having to undergo a psychiatric evaluation.

Having undergone a psychiatric evaluation, Plaintiff was diagnosed as no longer suffering from depression, but suffering from Narcissistic Personal Disorder (NPD), and thus would suffer in the structured Postal Service environment and which would likely lead to depression. In June 2000, the Postal Service wrote to Plaintiff informing him first that they accepted this diagnosis and second that he would have to submit an independent psychiatric evaluation stating that he did not suffer from NPD to be reemployed, Plaintiff claimed this letter was discriminatory and filed case number CV-S-01-007l-KJD in January 2001, alleging retaliation, discrimination under Title VII and violations of the Rehabilitation Act and Employee's Compensation Act.

On September 19, 2001, Plaintiff Green consolidated his claims from case 01-0071 with those from this case (00-0155) leaving alleged violations of Title VII and the Rehabilitation Act arising in connection with: (1) the 1998 requirement that Green submit to a psychiatric evaluation

in connection with this application for re-employment and (2) the June 2000 letter informing Green that the Postal Service accepted the diagnosis that he suffered from NPD. Thus far, none of Plaintiff's lawsuits have been successful.

II. ANALYSIS

A. Standard of Review

A motion for summary judgment is a procedure which terminates, without a trial, actions in which "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A summary judgment motion may be made in reliance on the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any." Id.

The movant is entitled to summary judgment if the non-moving party, who bears the burden of persuasion, fails to designate "'specific facts showing that there is a genuine issue for trial,'" *Celotex Core. v. Catrett*, 477 U.S. 317, 324 (1986) (quoting Fed. R. Civ. P. 56(e)). Thus, in order to preclude a grant of summary judgment, the non-moving party must set forth "'specific facts showing that there is a genuine issue for trial,' "*Matsushita Elec. Indust, Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). The substantive law defines which facts are material, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). All justifiable inferences must be viewed in the light most favorable to the non-moving party. *County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001) (citing *Zenith Radio Corp.*, 475 U.S. at 587)

Although the non-moving party has the burden of persuasion, the party moving for summary judgment

bears the initial burden of showing the absence of a genuine issue of material fact. *Metro Indust., Inc. v. Sammi Corp.*, 82 F.3d 839, 847 (9th Cir. 1996). That burden is met by showing an absence of evidence to support the non-moving party's case. *Celotex Corp.*, 477 U.S. at 325. The burden then shifts to the non-moving party to set forth specific facts demonstrating that there is a genuine issue for trial. *Liberty Lobby, Inc.*, 477 U.S. at 250. In meeting this burden, the non-moving party must go "beyond the pleadings and by its own evidence present specific facts showing that there is a genuine issue for trial." *Far Out Prod. v. Oskar*, 247 F.3d 986. 997 (9th Cir. 2001)

B. Defendant's Motion for Summary Judgment

Defendant argues that Plaintiff fails to present a prima facie case of retaliation for either (1) the Psychiatric Evaluation or (2) the June 2000 letter because neither of these two events constitutes an adverse employment action. What is more, Defendant claims that Plaintiff Green fails to provide any specific and substantial evidence of pretext in support of a retaliation claim. Plaintiff counters that the requirement of a psychiatric evaluation violates the anti-retaliation provisions of Title VII and the Rehabilitation Act.

Res judicata, or claim preclusion, prohibits lawsuits "on any claims that were raised or could have been raised" in a prior action. *Owens v. Kaiser Found. Health Plan. Inc.*, 244 F.3d 708, 713 (9th Cir. 2001). Res judicata applies when there is: "(1) an identity of claims; (2) a final judgment on the merits; and (3) identity or privity between the parties." *Id.*

Prior to filing this litigation, Plaintiff filed an appeal with the Merit Systems Protection Board on February 28, 1998, alleging that the Postal Service had denied him priority consideration to be rehired as required by 5 C.F.R.

§ 353.301(b), by requiring that he submit to medical and psychiatric evaluations as a condition to his reemployment. That appeal was dismissed by the Board on June 19, 1998, for lack of subject matter jurisdiction. The ALJ found, however,

> that the agency's actions were reasonable under the circumstances, and consistent with its normal practice. I find further that in asking the appellant to provide additional information, and submit to a psychiatric evaluation, it acted within its discretion under 5 C.F.R. § 302.303(a) (2), to set reasonable conditions on reemployment, even for those entitled to priority consideration.

(MSJ Exh. 4 Decision of ALJ Phillip D. Reed, p. 6). The United States Court of Appeals for the Federal Circuit reversed the dismissal for lack of subject matter jurisdiction, but nevertheless dismissed the case holding the error was harmless because Green failed to prove entitlement to relief. The Court of Appeals found that

> the Postal Service's request that Green undergo a psychiatric evaluation by a specialist selected by the Postal Service was not inconsistent with normal practices, beyond its discretion or unreasonable under the circumstances.

Green v. United States Postal Service, No. 98-3349, 1999 WL 127499 at *4 (Fed. Cir. March 9, 1999).

Therefore, with respect to plaintiff's claim that the Postal Service violated Title VII by requesting that Plaintiff meet with a psychiatrist, the Court finds that the elements of res judicata are established. There is identity of

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* John E. Potter is substituted for his predecessor, William G. Henderson, as Postmaster General of the United States pursuant to Fed. R. App. P. 43(c)(2).

the claims, a final decision and identical parties. Consequently, even assuming arguendo, that Plaintiff Green can establish a prima facie case under *McDonnell Douglas*, res judicata precludes him from further establishing that the Postal Service's articulated reason for the psychiatric exam was a pretext for unlawful discrimination by either directly persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 654, 658-59 (9th Cir. 2002) (internal quotation omitted). In short, the validity of requiring a psychiatric exam has already been found to be legitimate and therefore cannot be a basis for Title VII liability.

The next issue raised by Plaintiff's Complaint is the June 2000 letter which Plaintiff claims constitutes an adverse employment action. The letter stated that the Postal Service agreed with Dr. Roitman's diagnosis that Plaintiff Green suffers from a narcissistic personality disorder with past decompensation to dysthymia. The letter further stated that if Green disagrees with the diagnosis, he may secure independent psychological testing to support his contention that the diagnosis was made in error. Under no set of facts can this Court find that the June 2000 constituted an adverse employment action.

Adverse employment actions for Title VII purposes are "termination, dissemination of negative employment reference, issuance of an undeserved performance review and refusal to consider for promotion." *Brooks v. City of San Mateo,* 229 F.3d 917, 928 (9th Cir. 2000). Requiring a candidate for reinstatement to provide medical evidence to dispute a diagnosis is not an adverse action. Independent of that logic, even assuming that the June 2000 letter constituted an adverse action. Plaintiff has failed to demonstrate that the June 2000 constitutes *pretext.* Both the

Merit Systems Protection Board and the Federal Circuit found the *psychiatric evaluation to be legitimate.* Consequently, providing plaintiff with a means to challenge that evaluation in the midst of litigation is not pretextual given that the evaluation is legitimate.

To establish a prima facie case of disability discrimination under the Rehabilitation Act, 29 U.S.C. § 701, *et seq.*, Green must show that he (1) is an individual with a disability, (2) was otherwise qualified, and (3) was subjected to discrimination because of his disability, *Lucero v. Hart*, 915 F.2d 1367. 1371 (9th Cir. 1990). An individual with a disability is any person who has a physical or mental impairment that substantially limits one or more of their major life activities, 42 U.S.C.S. 12102 (2) (A). "Substantially limited" refers to the inability to perform a major life activity as compared to the average person in the general population, or a significant restriction as to the condition, manner, or duration under which an individual can perform the particular activity. *See Toyota Motor Mfg. v. Williams*, 534 U.S. 184 (2002)

Plaintiff fails to present any facts, even allowing for every inference being construed in his favor, to support a major life activity that is substantially limited by Narcissistic Personality Disorder. The inability to work in a particular position does not render an employee substantially limited, *Sutton v. United Air Lines. Inc.*, 527 U.S. 471 491 (1999). In short, Plaintiff Green cannot show that he is disabled under the Rehabilitation Act because he does not suffer from a mental impairment that substantially limits a major life activity.

III. CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment (#55) is GRANTED. Because summary judgment is granted in favor of Defendant, the Court need not consider Plaintiff's Motion for Partial Summary Judgment on the issue of liability and that motion is DENIED as moot. (#58).

IT IS SO ORDERED.

DATED: August 21st 2002

/s/ LARRY R. HICKS
LARRY R. HICKS
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

RONALD L. GREEN,
Plaintiff,

V.

WILLIAM J. HENDERSON,
Postmaster General,
Defendant.

CV-S-98-1130-JBR (RLH)

ORDER

This matter is before the Court on Defendant's Motion to Dismiss (#6). Plaintiff filed an Opposition (#7), ar Amended Opposition (#22), and a Reply to Defendant's Response (#31). Defendant filed a Reply (#9) and an Amended Reply (#33).[1]

BACKGROUND

The complaint in this case alleges that Defendant discriminated against Plaintiff on the basis of race, disability and in retaliation for filing EEO complaints.

Plaintiff is a former employee of the United States Postal Service ("USPS"). Plaintiff took an extended leave from the USPS due to diagnosed depression. Plaintiff was placed on disability and ultimately his employment with the USPS was terminated. When Plaintiff sought reemployment with the USPS, the USPS required that he submit to a medical and psychiatric examination to determine whether he had fully recovered. Plaintiff contends that the USPS's requirement that he submit to a psychiatric examination was imposed because of his race (African American), disability (depression), and in retaliation for Plaintiffs past EEO complaints. Plaintiff also asserted that the requirement of a psychiatric examination violated the provisions of the Federal Employees Compensation Act ("FECA").

Plaintiff appealed the USPS's requirement to the Merit Systems Protection Board ("MSPB"). In his administrative claims, Plaintiff alleged that the USPS's actions violated the FECA, Title VII of the 1964 Civil Rights Act (prohibiting discrimination on the basis of race) and the Rehabilitation Act (prohibiting discrimination on the basis of disability).

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[1] Defendant's first amended reply was stricken pursuant to Defendant's request (#36).

The Administrative Judge who considered Plaintiffs MSPB claims ruled that the USPS did not violate the FECA and dismissed Plaintiffs appeal for lack of jurisdiction (#22, Exhibit "2"). Plaintiff appealed the Administrative Law Judge's decision to the Federal Circuit of Appeals. The Federal Circuit affirmed the decision in favor of USPS, but also held that the dismissal for lack of jurisdiction was erroneous (#22, Exhibit "6," pp. 9-10).

Defendant contends that this Court has no subject matter jurisdiction over the claims set forth in the complaint because Plaintiff failed to exhaust his administrative remedies.

Plaintiff contends that he preserved his discrimination claims by joining them with his administrative claims under FECA.

DISCUSSION

The pivotal issue in this case is whether Plaintiff can pursue this action in district court after appealing the MSPB decision to the Federal Circuit Court of Appeals. Both parties have cited the case of *Sloan v. West*, 140 F.3d 1255 (9th Cir. 1998), in support of their respective positions.

In *Sloan*, the Ninth Circuit ruled that when a case involves Title VII and civil service claims, the claimant may preserve the Title VII claims by bringing those claims before the MSPB together with the civil service claims. Plaintiff did in fact bring his Title VII and civil service claims before the MSPB. Since the MSPB ruled that it had no jurisdiction over Plaintiffs appeal (#22, Exhibit "2"), Plaintiff properly sought review in the Federal Circuit Court of Appeals. *See Sloan*, 140 F.3d at 1262. However, Plaintiffs appeal to the Federal Circuit Court of Appeals

did not eliminate the requirement of filing an administrative Equal Employment Opportunity (EEO) claim. Rather, the Title VII statute of limitations is tolled. *See id.*

Because Plaintiff did not exhaust his administrative remedies prior to filing his claim with the MSPB, his complaint must be dismissed. However, the Title VII statute of limitations should be equitably tolled for the period during which Plaintiff was pursuing his claim before the MSPB and the Federal Circuit Court of Appeals. Because of the "jurisdictional Gordian knot" of mixed case claims, equitable tolling is also appropriate for the proceedings in this Court. Accordingly,

IT IS **ORDERED** that Defendant's Motion to Dismiss Complaint (#6) is GRANTED.

IT IS FURTHER **ORDERED** that Plaintiffs Complaint (#1) is DISMISSED without prejudice.

IT IS FURTHER **ORDERED** that the Title VII period of limitations is tolled from the time Plaintiff filed his claim with the MSPB until the date this order is entered by the Clerk of the Court.

The Clerk shall enter judgment accordingly.

DATED this 21st day of July 1999.

/s/ Johnnie B. Rawlinson

Johnnie B. Rawlinson
United States District Judge

A-19

RONALD L. GREEN, Petitioner, v.
UNITED STATES POSTAL SERVICE, Respondent.

98-3349

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

1999 U.S. App. LEXIS 3748

March 9, 1999, Decided

NOTICE:

[*1] RULES OF THE FEDERAL CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Rehearing Denied May 4, 1999, Reported at: *1999 U.S. App. LEXIS 10825.* Reported in Table Case Format at: *1999 U.S. App. LEXIS 33367.*

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner sought review of a final decision of the Merit Systems Protection Board, which dismissed his appeal for lack of subject matter jurisdiction. In the appeal, petitioner had alleged that his former employer, respondent United States Postal Service, effectively denied him priority consideration as required by *5 C.F.R. § 353.301(b).*

OVERVIEW: The court upheld a decision of the Merit Systems Protection Board rejecting petitioner's appeal even though it was error for the board to dismiss the appeal for lack of subject matter jurisdiction. In the appeal, petitioner alleged that respondent United States Postal Service, his former employer, had effectively denied him priority consideration for reemployment as required by *5 C.F.R. § 353.301*(b) after his recovery from a compensable disabling mental condition. Respondent had insisted that its psychiatrist examine petitioner, but petitioner refused. The board erred by confusing the question of subject matter jurisdiction with the question of entitlement to relief. It would have been more accurate to conclude that petitioner failed to prove the necessary

elements of his nonfrivolous claim. Nevertheless, this error was harmless because the administrative judge properly made his factual findings and properly held that petitioner failed to prove the necessary elements of his claim. Specifically, respondent met its burden of demonstrating that its actions were reasonable under the circumstances, consistent with its normal practice, and within its discretion.

OUTCOME: The court upheld a decision of the Merit Systems Protection Board dismissing petitioner's appeal alleging that respondent United States Postal Service had denied him priority consideration for reemployment, because the board's dismissal of the appeal for lack of subject matter jurisdiction was harmless error. The administrative judge otherwise properly held that petitioner failed to prove the necessary elements of his claim.

CORE TERMS: reemployment, psychiatric evaluation, subject matter jurisdiction, specialist, undergo, dysthymic, disorder, regulation, physical examination, drug testing, psychiatrist, objected, entitled to priority, credibility, failed to prove, mental illness, restoration, scheduled, harmless, protest, substantial evidence, second guess, nonfrivolous, pertaining, appealable, psychiatric examination, entitlement to relief, final decision, urine sample, asking

CORE CONCEPTS —

Administrative Law: Judicial Review: Standards of Review: Standards Generally

Governments: Federal Government: Employees & Officials

The court's statutorily prescribed standard of review allows it to reverse a decision of the Merit Systems Protection Board (Board) only if it was arbitrary, capricious,

an abuse of discretion, or unlawful; procedurally deficient; or unsupported by substantial evidence. Whether the Board has jurisdiction to adjudicate an appeal is a question of law, which the court reviews *de novo*. Further, the Board's jurisdiction is not plenary, but is limited to actions made appealable to it by law, rule or regulation.

Workers' Compensation & SSDI: Remedies Under Other Statutes: Federal Employee's Compensation Act See *5 C.F.R.§ 302.501*.

Administrative Law: Judicial Review: Standards of Review: Standards Generally

Governments: Federal Government: Employees & Officials

When a nonfrivolous claim for relief has been asserted before the Merit Systems Protection Board (Board), and the outcome is determined by whether the facts support that claim, a decision by the Board that they do not is a failure to prove the claim, not a lack of jurisdiction in the Board.

Administrative Law: Judicial Review: Standards of Review: Standards Generally

Governments: Federal Government: Employees & Officials

On appeal, the petitioner bears the burden of establishing that the Merit Systems Protection Board (Board) lacked substantial evidence to support its factual findings. In so doing, credibility determinations made by the Board are virtually unreviewable and the court does not second guess management decisions of an agency.

Workers' Compensation & SSDI: Remedies Under Other Statutes: Federal Employee's Compensation Act See *5 U.S.C.S.§ 8151* (b)(2).

Workers' Compensation & SSDI: Remedies Under Other Statutes: Federal Employee's Compensation Act See *5 C.F.R.§ 302.303.*

JUDGES: Before MICHEL, RADER, and GAJARSA, Circuit Judges.

OPINION:
PER CURIAM.

DECISION

Ronald L. Green petitions for review of a final decision of the Merit Systems Protection Board (the "Board"), Green v. United States Postal Service, Docket No. SF-0353-98-0372-I-1, dismissing his appeal for lack of subject matter jurisdiction. While we discern error in the Board's dismissal of Green's appeal for lack of subject matter jurisdiction, we hold the error was harmless because he failed to prove entitlement to relief and we therefore affirm.

BACKGROUND

From January 1986 to January 1994, Green was employed by the United States Postal Service in Las Vegas, Nevada, as a maintenance control and stock clerk. Effective January 7, 1994, Mr. Green was removed from this position due to a compensable disabling condition, dysthymic disorder (a form of depression). His compensation benefits began on or before April 14, 1994 and ceased on December 15, 1997. Green's compensation benefits were terminated [*2] by the Department of Labor's Office of Workers' Compensation Program ("OWCP") based upon a November 14, 1997 report of Dr. Zielinski, a licensed clinical psychologist for the Department of Veterans Affairs, stating that Green had recovered from dysthymic disorder. On December 15, 1997,

the Postal Service notified Green by letter that his rights to reemployment, after being separated due to a disability, are contained in section 546 of the Postal Service's Employee and Labor Relations Manual. On January 2, 1998, Green timely requested priority consideration for reemployment with the Postal Service under *5 C.F.R. § 353.301(b)* (1998), pertaining to full recovery more than one year after compensation began.

On February 12, 1998, Dr. Charles Van Valkenburg, a psychiatrist for the Department of Veterans Affairs, reported to the Postal Service that Green was no longer suffering from dysthymic disorder and was free of other mental illness On February, 24, 1998, the Postal Service informed Green by letter that he needed to complete a PS Form 2591, "Application for Employment," prior to consideration of his request for reemployment. On February 28, 1998 Green advised the Postal Service that [*3] he believed they were unnecessarily delaying his restoration to employment and he requested that the Postal Service inform him what rules, regulations or guidelines required the completion of the PS Form 2591 in connection with his request for reemployment. On March 4, 1998, in reply to Green's objection, an official of the Postal Service stated that when considering all requests for reemployment the applicants were required to complete and submit PS Form 2591, but that he would accept an updated, or continuation, of the PS Form 2591 which Green had filled out when he first began working for the Postal Service. Green objected to the referenced action because the Postal Service did not advise Green of any rule, regulation or guideline that required the completion of PS Form 2591 in connection with his request for reemployment. Nevertheless, on March 7, 1998 Green submitted the completed PS Form 2591 to the Postal Service under protest.

By a March 11, 1998 letter, the Postal Service informed Green that it requires all applicants for employment to provide a urine sample for drug testing and that pursuant to this he was scheduled to provide a urine sample for drug testing on March 16, [*4] 1998. Green again objected for the same reason stated above, but nevertheless agreed to take the test under protest. Green passed the urinalysis drug testing and thus qualified for further reemployment consideration.

On April 3, 1998, the Postal Service informed Green that he was scheduled for a physical examination on April 6, 1998. Green objected for the same reason stated above, but submitted to the examination under protest. Dr. Collet, the examining physician, advised Green that the physical examination seemed fine to him, but that Green needed to undergo a psychiatric evaluation by a specialist.

By an April 17, 1998 letter, the Postal Service informed Green that, in accordance with Dr. Collet's request, they had scheduled an appointment for him with Dr. Roitman, a psychiatrist, for April 27, 1998. Green again objected and informed the Postal Service by letter dated April 25, 1998 that he would not appear for the appointment with Dr. Roitman. On May 11, 1998, Dr. Van Valkenburg reported that he had examined Green and found that he no longer suffered from dysthymic disorder. Green did not present himself for the April 27, 1998 psychiatric examination with Dr. Roitman and was [*5] not further considered by the Postal Service for reemployment.

On February 28, 1998, Green filed an appeal with the Board alleging that the Postal Service had effectively denied priority consideration as required by *5 C.F.R. § 353.301(b)*, by requiring that he submit to medical and

psychiatric evaluations as a condition of his reemployment. n1 The Board held that Green did not establish that any appealable action occurred and dismissed the appeal for lack of subject matter jurisdiction.

n1 We note that Green filed the appeal with the Board on February 28, 1998 after the Postal Service informed him by letter that he needed to complete a PS Form 2591 prior to consideration of his request for reemployment, but before all other requests were made by the Postal Service. In any event, at a hearing on June 4, 1998, the Administrative Judge ("AJ") heard Green's arguments pertaining to all of the Postal Service's requests, including the April 17, 1998 letter requesting Green to meet with Dr. Roitman for a psychiatric exam, and considered them in making his final decision.

DISCUSSION

We have jurisdiction to hear this appeal under *28 U.S.C. § 1295*(a)(9) (1994). Our statutorily prescribed standard of review allows us to reverse a decision of the Board only if it was arbitrary, capricious, an abuse of discretion, or unlawful; procedurally deficient; or unsupported by substantial evidence. See *5 U.S.C. § 7703*(c) (1994). Whether the Board has jurisdiction to adjudicate an appeal is a question of law, which we review *de novo*. See *Forest v. Merit Sys. Protection Bd., 47 F.3d 409, 410 (Fed. Cir. 1995)* (citing *Vesser v. Office of Personnel Management, 29 F.3d 600. 603 (Fed. Cir. 1994)).*

The Board's jurisdiction is not plenary, but is limited to actions made appealable to it by law, rule or regulation. See *5 U.S.C. § 1204* (1994); *Minor v. Merit Sys. Protection Bd., 819 F.2d 280, 282 (Fed. Cir. 1987).* One such regulation granting the Board jurisdiction is *5 C.F.R. § 302.501* (1998), which states that:

An individual who is covered by *5 U.S.C. 8101*(1) and is entitled to priority consideration under part 302 may appeal a violation of his/her restoration rights to the [Board] under the provisions of the Board's regulations by [*7] presenting factual information that he or she was denied restoration rights because of the employment of another person.

It is not in dispute that Green is covered by *5 U.S.C. § 8101*(1) (1994) or that he is entitled to priority consideration. Nor is it disputed that from January 1998 to June 1998, the Postal Service employed others in positions for which it might have selected Green, had it not required that he submit to further psychiatric evaluation. Green, however, disputes the determination that, because he did not submit to such evaluation in connection with his reemployment, the Board lacked subject matter jurisdiction. Green argues that in considering this issue, the Board confused the question of subject matter jurisdiction with the question of entitlement to relief. We agree.

We conclude that when the Board dismissed for lack of subject matter jurisdiction it obscured the nature of the defect in Green's appeal. It would have been more accurate to conclude that Green failed to prove the necessary elements of his cause. The Board must determine whether subject matter jurisdiction existed, as long as Green asserted nonfrivolous claims, which we hold he did. See *Spruill [*8] v. Merit Sys. Protection Bd., 978 F.2d 679, 687 (Fed. Cir. 1992)*. We recognize, moreover, that this is a case in which the facts that establish jurisdiction are intertwined with the facts that determine the merits. Thus, "when a nonfrivolous claim for relief has been asserted before the Board, and the outcome is determined by whether the facts support that claim, a decision by the Board that they do not is a failure to prove the claim, not

a lack of jurisdiction in the Board." *Id. at 689.* We conclude, however, that this error was harmless because the AJ properly made his factual findings and properly held that Green failed to prove the necessary elements of his claim.

On appeal, Green bears the burden of establishing that the Board lacked substantial evidence to support its factual findings. See *Hayes v. Department of the Navy, 727 F.2d 1535, 1537 (Fed. Cir. 1984).* In so doing, credibility determinations made by the Board are virtually unreviewable, see *Hambsch v. Department of the Treasury, 796 F.2d 430, 436 (Fed. Cir. 1986),* and we do not second guess management decisions of an agency, see *Haynes, 727 F.2d at 1537,* here the decision to require a second psychiatric [*9] examination by a specialist of its choosing.

Green contends that his refusal to submit to a second psychiatric evaluation was justified because the qualification standards chosen by the Postal Service were unreasonable under the circumstances, inconsistent with normal practice and beyond its discretion.

Title *5 U.S.C. § 8151*(b)(2) (1994) provides, in pertinent part, that:

The department or agency which was the last employer shall . . . make all reasonable efforts to place, and accord priority to placing, the employee in his former or equivalent position within such department or agency, or within any other department or agency.

In carrying out this statutory requirement, *5 C.F.R. § 302.303* (1998) provides an agency, such as the Postal Service, with discretion to "limit consideration granted to applicants for specific positions or applicants who meet specific conditions, but must make those conditions a matter of record and must apply its policy uniformly to all eligible employees." In order to comply with section

302.303, the Postal Service issued its Employee and Labor Relations Manual. Section 546 of the Postal Service's Employee and Labor Relations Manual "requires" [*10] the Postal Service to conduct a "complete physical examination" before it restores an employee to duty, and the Postal Service's medical officer can further restrict, but not liberalize, any work restrictions set by OWCP. Further, the Postal Service has the right to collect and review all relevant information before making a decision to employ, transfer, reassign, reinstate or reemploy all applicants, including Green.

We do not discern that Green has been subjected to any unnecessary or additional processes or procedures by the Postal Service in connection with his reemployment. Asking that Green provide an updated employment application and submit to drug testing were normal and reasonable practices of the Postal Service required of all applicants, especially in cases where a considerable length of time had passed since the former employee had been employed with the Postal Service, as in Green's case (4 years).

Furthermore, the Postal Service's request that Green undergo a psychiatric evaluation by a specialist selected by the Postal Service was not inconsistent with normal practices, beyond its discretion or unreasonable under the circumstances. First, considering Betty Jean Miller's [*11] testimony before the AJ, it was not inconsistent with normal practice of the Postal Service to request that Green undergo such an evaluation due to his history of significant mental illness Miller, the Occupational Health Nurse Administrator for the agency's Las Vegas District, testified that she supervises medical evaluations for all applicants for reemployment, and that under agency regulations every applicant with a history of significant illness or injury is referred to a specialist before he or she

is cleared for reemployment. This testimony clearly establishes that it was routine to request a psychiatric evaluation in the case of a significant mental illness, such as dysthymic disorder. Obviously, this examination is in addition to the routine physical examination also routinely required. Thus, it was not inconsistent with normal practice for the Postal Service to request such an evaluation in Green's case.

Second, it was not beyond the Postal Service's discretion to request that Green undergo a psychiatric evaluation. Admittedly, Green submitted to the Postal Service reports of his own psychiatrist and psychologist regarding his recovery from dysthymic disorder. In light of [*12] these reports and Dr. Collet's request that Green undergo a psychiatric evaluation by a specialist, the Postal Service determined that Green undergo a psychiatric evaluation by a specialist selected by the Postal Service. We cannot second guess this managerial decision. See *Haynes, 727 F.2d at 1537.* In any event, it was not an abuse of the agency's discretion. Just because Green is entitled to priority consideration does not mean that he can evade lawful and reasonable protective measures set up by the Postal Service to ensure that an applicant meets the criteria for reemployment.

Finally, in light of Miller's testimony, it was also not unreasonable under the circumstances for the Postal Service to request that Green undergo a second psychiatric evaluation. Miller testified that because they were not administered by a board-certified psychiatrist, the evaluations presented by Green in support of his application for reemployment did not meet the agency's published standards governing such cases. Further, Miller testified that the medical clearance by Dr. Van Valkenburg assumed certain facts she knew to be in error. This testimony establishes the Postal Service's concern regarding

[*13] the credibility of the psychiatric evaluation presented by Green and thus justified its desire to verify such evaluation with an opinion of a specialist selected by the Postal Service. Thus, without substituting our own credibility determinations for those of the Board or second-guessing management decisions of the agency, we believe that the Board's decision rejecting Green's appeal is supported by substantial evidence and was in accordance with law.

CONCLUSION

We conclude it was error for the AJ to dismiss Green's appeal for lack of subject matter jurisdiction. Considering all of the affirmable implicit and explicit findings of the AJ, however, we hold that this error was harmless. The AJ found the Postal Service met its burden of demonstrating that its actions were reasonable under the circumstances, consistent with its normal practice and that asking Green to provide additional information and submit to a second psychiatric evaluation by a specialist, and one selected by the Postal Service, was within its discretion. We agree. Even the delay Green complains of can be mostly attributed to his own conduct and reluctance to comply with the agency's reasonable requests. Finally, [*14] because he refused to undergo the second psychiatric evaluation, the Postal Service was justified in taking no further action on his priority reemployment request. Accordingly, the Board's decision rejecting Green's appeal is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

GREEN V. UNITED STATES POSTAL SERVICE
No. (Not Yet Assigned)

Petitioner's Statement Concerning Discrimination

(INSTRUCTIONS: Select only one of the following statements. Do not alter or add to any of the statements.)

_____ (1) No claim of discrimination by reason of race, sex, age, national origin or handicapped condition has been or will be made in this case.

_____ (2) Any claim of discrimination by reason of race, sex, age, national origin, or handicapped condition raised before the employing agency or the Merit Systems Protection Board has been abandoned and will not be raised or continued in this or any other court.

XXX (3) The petition seeks review only of the Merit Systems Protection Board's dismissal of the case for lack of jurisdiction or for untimeliness.

Also, answer the following: Have you filed a discrimination case in a United States district court: YES. In the Equal Employment Opportunity Commission: NO If so, identify each case. Use extra sheets if needed.

United States District Court for the Southern Division of the District of Nevada Case No.: CV-S-98-0l130-DWH (RLH) — (To be held in abeyance pending Federal Circuit review of MSPB jurisdiction).

August 10, 1998
Date

/s/ Ronald L. Green
Petitioner's signature

Mail this form with the petition for review to:

Clerk
United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.,
Washington, DC 20439

GUIDE FOR PRO SE PETITIONERS FILING PETITIONS FOR REVIEW OF INITIAL DECISIONS OF ADMINISTRATIVE JUDGES OF THE MERIT SYSTEMS PROTECTION BOARD

SPECIAL NOTICE

This guide was prepared by the United States Court of Appeals for the Federal Circuit, and it is distributed by the Merit Systems Protection Board at the request of the court. This guide accompanies the initial decision of the administrative judge of the Merit Systems Protection Board in your appeal. Only those who appealed to the board pro se (without representation by legal counsel) are given this guide.

The initial decision itself contains a statement describing your alternative rights of appeal. Study that statement carefully.

Disregard this special notice and the forms attached to this guide if you choose to petition the Merit Systems Protection Board to review the administrative judge's decision. If the MSPB declines to review the administrative judge's decision or if, after review, the final order of the MSPB itself is adverse to you, then the MSPB will explain your rights to further review and provide you with the appropriate version of the guide.

You should use this version of the guide and its forms only if you choose to file a petition for review of the initial decision with this court without first asking the MSPB to review the initial decision of the administrative judge. Furthermore, you should not file a petition for review in this court until the initial decision of the administrative judge has become the final decision of the board on the date indicated by the board.

The court takes no position on whether you should waive review before the MSPB itself by filing a petition for review in this court now. However, you should be aware you might delay the ultimate resolution of your case by waiving your right to petition the MSPB itself from the initial decision. This is so because when the court finds error in the proceedings it usually remands the matter for further action by the MSPB. It is quite possible that the MSPB would find the same error when reviewing the initial decision, and correct it on the spot. Then there would be no need to petition this court for review.

This guide is derived from the Rules of Practice before the United States Court of Appeals for the Federal Circuit. You will receive a copy of the entire Rules publication when you file a petition for review in the court.

1. *Appearing pro se or by counsel; unions; organizations; nonlawyer representatives; deceased petitioners.* — You as an individual may conduct your own case pro se in the United States Court of Appeals for the Federal Circuit. ("Pro se" means "in his own behalf.") If you are pro se, you must file a written entry of appearance, within 10 days after your case is docketed, on the form provided by the clerk. Alternatively, you may be represented by a lawyer admitted to practice before this court. if legal counsel enters an appearance, only counsel may conduct the case. The court has no procedure to appoint counsel for you. A union, organization. or other nonlawyer representative may not represent you in this court even if such represented you before the Merit Systems Protection Board. Nor may other lay spokespersons like relatives or friends represent you in this court. An executor or administrator of the estate of a petitioner also must be represented by counsel.

2. *Available materials.* — Your pro se case is subject to the United States Code, Federal Rules of Appellate Procedure, and Federal Circuit Rules. You may obtain the Rules of Practice from the clerk, and you will be sent a copy when your case is docketed. You will find the statutes governing this court's jurisdiction and related matters in the United State Code, the United States Code Annotated, or the United States Code Service, and the decisions of the court in the Federal Reporter, Second Series (F.2d) and Third Series (F.3d), all available in many public libraries.

3. *Filing petitions for review; postmark does not establish timeliness; forms.* — You must file your petition for review within the time allowed by the statute that authorizes it. Your petition is not considered filed at the time it is postmarked by the U.S. Postal Service; it must actually be received in the place for filing within the time allowed by statute. The statute governing petitions for review from an initial decision of the Merit Systems Protection Board provides that if you did not petition the board to review the initial decision of the board's administrative judge, you have 30 days to file a petition for review with the clerk of this court after the time to petition the board expires. If you petition both the board and this court at the same time to review the initial decision of the administrative judge, your petition to this court will be dismissed as premature.

Either your employing agency or the Office of Personnel Management as named in the order of the Merit Systems Protection Board, or the board itself, will be the respondent in your petition for review. In your petition for review, you should name as respondent the agency captioned in the board's order on your appeal. If the board should be the respondent rather than the agency, you will be notified by the clerk.

Timeliness — If a petition for review filed with the clerk shows on its face that it is not timely filed within the time allowed by statute to petition, the clerk will reject the petition. When it cannot be determined from the facts set forth whether a petition for review is timely, but the clerk has reason to believe it may be untimely, the clerk will ascertain from the board when notice of its decision was received by the petitioner and will thereupon make a determination of timeliness If the clerk determines that the petition for review is untimely, the clerk will reject it. Thereafter, if the petitioner submits proof of timeliness, the clerk will enter the petition for review upon the docket of the court.

Extensions of time to petition for review requested in this court — This court lacks authority to extend the time to petition for review because the applicable statutes do not confer on the court the power to waive or extend the time to petition. When an application or request to extend the time to petition is received, if the time to petition has not yet passed, the application or request will be deemed to be the petition for review, and it will be placed on the docket by the clerk. However, if the time to petition has passed, the application or request will be returned by the clerk without judicial action as the court lacks authority to extend the time to petition for review.

Forms — You do not need a special form for a petition for review of an initial decision of the board, but you may use the form provided in the Appendix of Forms in the court's Rules of Practice. A copy of the form for a petition for review of an initial MSPB decision is also attached to this guide. You will also find the form wherever the Federal Rules of Appellate Procedure are reprinted. You should put your current mailing address and telephone number on the petition. You should include on the petition the file number of the case when it was in the

board and the date you received notice of the decision. You should attach a copy of the administrative judge's decision to the petition. All papers must be 8½ by 11 inches.

4. *Fees* — You are required to pay a docketing fee of $100 to the clerk of this court when you petition for review of the initial decision of an administrative judge of the board. The options about the docketing fee are set forth in the form for a petition for review attached to this guide. If the fee has not been paid or if you have not filed a motion for leave to proceed in forma pauperis within 14 days after the case is docketed in this court, the case will be dismissed.

5. *Permission to proceed in forma pauperis; waiving fees.* — You may qualify to proceed in forma pauperis if the court determines that you are unable to pay the fee. Permission to proceed in forma pauperis means that the docketing fee and certain requirements concerning formal briefs are waived; it does not mean that a free transcript of the hearing or trial will be provided, or that a free lawyer will be appointed, or that the assessment of costs will be waived. You may request to proceed in forma pauperis on a form available from the clerk of this court. You are required to disclose all your financial resources on the form. You should file the form with your petition for review, but if you do not file it at that time, it must be filed within 14 days of the date of docketing.

6. *Discrimination claims in Merit Systems Protection Board cases.* — This court does not have jurisdiction to review cases involving bona fide claims of discrimination based on race, sex, age, national origin, or handicap that were raised before the Merit Systems Protection Board. If your case involves such claims and you are unwilling to abandon them forever, you must proceed in a district court (which will hear all your claims, both discrimination

and nondiscrimination) or before the Equal Employment Opportunity Commission (which will hear your discrimination claims only). You may waive your discrimination claims on the Federal Circuit Rule 15 (c) form sent to you by the clerk. If you fail to complete and return the form within 14 days after the date of docketing, the clerk will dismiss your petition for review. A discrimination issue raised for the first time in this court does not affect the jurisdiction of the court to decide the issues raised before the Board, and such a discrimination claim will be disregarded.

7. *This court does not conduct new trials or hearings.* — This court reviews only what the board's administrative judge did in your case. You cannot retry the facts before this court. Review is limited to the written record of proceedings that were held before the board's administrative judge. You cannot raise in this court matters that you did not present first before the board's administrative judge. You must show that the version of the facts accepted by the board's administrative judge is not supported by substantial evidence. If you show that the board erred, you must also show that the error materially affected the outcome of your case. Minor procedural errors rarely affect the outcome of a case. Procedural errors are usually deemed waived if not raised first before the board's administrative judge. If you are successful before this court, the court may issue a decision in your favor or it may send the case back (remand) for further proceedings before the board's administrative judge.

8. *Cases dismissed for lack of jurisdiction or for untimeliness* — If the board dismissed your case for lack of jurisdiction or because you did not file on time, you must limit your petition for review to these issues. In that situation, this court will not consider the merits of your case (whether you deserve to win or lose your case on the facts

and the law) and, if this court were to reverse the board on its jurisdictional or timeliness ruling, your case would be remanded to the board to consider the merits. If jurisdiction or timeliness was the basis of the decision you are appealing, you will waste your time and effort, and will unduly burden this court, if you discuss the merits.

9. *Frivolous petitions for review and appeals will be penalized.* — If you file and proceed with a frivolous petition for review, you are subject to the imposition of damages, double costs, and attorney fees payable to the other party. "Frivolous" means clearly hopeless and unquestionably without any basis whatever in fact or law. You may require the advice of an attorney in making your decision that your case is not frivolous.

10. *Withdrawing a pro se petition for review.* — You may ordinarily withdraw your pro se petition for review at any time before this court decides your case. To withdraw your case simply advise the clerk by letter, "I withdraw my case." Serve a copy of your letter on the other party. The Department of Justice will ordinarily consent to the withdrawal of a pro se case on the condition that each party bear its own costs. This court will ordinarily not assess damages, double costs, or attorney fees for filing a frivolous petition for review if it is voluntarily withdrawn within 14 days after you receive the other party's brief. Serious consideration should be given to voluntarily withdrawing your case if the other party's brief makes a strong argument that you are pursuing a frivolous case.

11. *Record.* — If you need access to the original record of the board proceedings, you must contact the board because the original record is not forwarded to this court.

12. *Service of notice of appearance, briefs, appendices, motions, letters, and other documents.* — You must serve on counsel for the other party (by mail or by personal

delivery) a copy of all notices of appearance, briefs, appendices, motions, letters, and other documents you send to the court. Make sure this court's docket number appears on every document. You must serve opposing counsel using the name and address contained on the entry of appearance form filed by that counsel and served on you. The clerk will not file and may return any material that is not accompanied by a certificate from you stating that you have served the other party with a copy of all the material sent to the court. A sample certificate follows:

CERTIFICATE OF SERVICE

I certify that I mailed my informal brief to John Doe, Esq., at the address listed on his entry of appearance.

The certificate of service may be included at the end of the material you are filing or it may be on a separate paper attached to that material. You may also make the certification of service on a photocopy of the opposing counsel's copy of the entry of appearance that was served on you and attach it to whatever you file with the clerk.

13. *Informal briefs; appendix; petitions for rehearing; motions; length; new evidence; correspondence generally.* — You may file an informal brief (original and three copies) on an accelerated schedule, using a form provided by the clerk of this court. You must include an appendix containing the initial decision of the Merit Systems Protection Board. The informal brief is the only permissible substitute for the brief required by the Federal Rules of Appellate Procedure and Federal Circuit Rules. The informal brief together with any continuation pages needed for answers that will not fit on the form may not exceed 50 typewritten (pica or 10-pitch type only), double-spaced pages with 1-inch margins, or their equivalent in content. You may employ a letter to the clerk (original and three copies) in replying to an opponent's brief, in requesting a

rehearing, or in submitting or responding to a motion, as no forms are provided for these submissions. Such letters when typewritten (pica or 10-pitch type only) and double spaced with 1-inch margins may not exceed the page limits provided in the rules for reply briefs (25 pages), petitions for rehearing (15 pages), and motions or responses to motions (10 pages), or the equivalent in content if not typewritten. Continuation pages for an informal brief, letters, and any other correspondence you submit must be on 8½-by 11-inch paper. In replying to an opponent's brief, you may not make new arguments that are unrelated to the arguments in that brief. When requesting rehearing, attach a copy of the court's opinion or judgment of affirmance without opinion to your letter and each of the three copies of the letter. Do not attempt to supplement the record on appeal with new evidence that was not considered at your hearing or trial. Any such new evidence will be returned by the clerk. There is usually no need to correspond by letter except for the matters described in this paragraph. Copies of correspondence with others about your appeal are not part of the record on appeal and may be returned by the clerk.

14. *Timetable for filing briefs; dismissal for default.* —

Informal briefs — In a petition for review of a decision from the board, you must file an informal brief within 21 days after the certified list or index is served. The other party may file either an informal brief within 21 days or a formal brief within 40 days after service of your informal brief. If you file a brief before the certified list or index is served and filed, the other party's time runs from service and filing of the certified list or index. If you attempt to serve government counsel using a name and address other than that contained on the entry of appearance served on you, the time for filing the government's informal brief

will not begin to run until the government attorney appearing in the case has actually received your brief. You may then file a reply brief in letter form within 10 days after service of the other party's brief.

Formal briefs — If you elect to file a formal brief, the brief and appendix must comply with the strict requirements of the Federal Rules of Appellate Procedure and the Federal Circuit Rules or the brief and appendix will not be accepted. A formal brief is due 60 days after the certified list is served in board cases. The other party must file a formal brief within 40 days of service of your formal brief or the certified list, whichever is later. Any reply must be a formal reply brief filed within 14 days of service of the other party's brief.

Dismissal for default — If you fail to file a brief or comply with other rules, the clerk will dismiss your petition. However, if the respondent fails to comply with the rules, you are not entitled to the relief you seek solely by reason of that noncompliance, because the petitioner always has the burden to establish entitlement to relief in the court of appeals and cannot meet that burden by the failure of another to comply with the rules.

15. *Oral argument.* — Oral argument (usually 15 minutes or less) is rarely needed in pro se cases. However, you may request to argue your case before the court, giving reasons why that would aid the court. If you are granted oral argument you must bear your own travel expenses to the court.

16. *Recovery of costs.* — If you lose before this court, you will normally be responsible for paying the costs of the other party. If you prevail, you will normally have your own costs paid by the other party. "Costs" means the expenses of printing or copying briefs and appendices, and may amount to several hundred dollars. Attorney

fees are not costs. If you are responsible for costs, the matter is between you and the other party, and the court will not resolve any dispute between the parties once the costs have been taxed.

17. *Attorney fees.* — You are not entitled to payment for your own services in pursuing your case pro se, because only an attorney may be awarded attorney fees. Before filing a petition for review or an appeal you may wish to seek a lawyer who might be willing to undertake the case on the contingency that the attorney fees may be payable under the Equal Access to Justice Act.

18. *Change of address* — You must file and serve a new notice of appearance if you change your address while your case is pending.

19. *Notice of the court's decision.* — You will be sent a copy of the court's opinion in your case by mail on the day it is filed with the clerk. If the court decides your appeal without preparing an opinion, you will be sent a copy of the judgment of affirmance without opinion. If you file a petition for rehearing, it must be received within 45 days of the date of the court's opinion. Untimely petitions for rehearing will be returned. Rehearings are rarely granted. Do not file a motion to alter or amend a judgment or a motion for relief from judgment as those motions are appropriate only in proceedings governed by Federal Rules of Civil Procedure 59 and 60. which do not apply in this court.

20. *Bulletin Board System.* — The court's Rules of Practice, recent precedential opinions, dispositions and the argument/submission calendars are available on the electronic bulletin board system (BBS). The system may be accessed with your personal computer's modem by dialing either 202-786-6584 or 202-633-9608. It is anticipated that additional court information will be available

for public access on the BBS in the future. For information about the BBS or to receive a user's brochure please contact the Clerk's Office.

21. *Additional information.* — For information, you may call the Clerk's Office at (202) 633-6550 or write to the Clerk, U.S. Court of Appeals for the Federal Circuit, 717 Madison Place, NW., Washington, DC 20439. Collect calls are not accepted. The staff of the Clerk's Office will answer questions about procedures, but they are not permitted to give you legal advice or to recommend how you should pursue your appeal.

UNITED STATES OF AMERICA
MERIT SYSTEMS
PROTECTION BOARD
WESTERN REGIONAL OFFICE

RONALD L. GREEN,
Appellant,

v.

UNITED STATES POSTAL SERVICE,
Agency.

DOCKET NUMLER
SF-0353-98-0372-I-1

DATE: June 19, 1998

Ronald L. Green, Green Valley, Nevada, pro se.

Douglas Alderman, Las Vegas, Nevada, for the agency.

BEFORE

Philip D. Reed
Administrative Judge

INITIAL DECISION

INTRODUCTION

The appellant has filed an appeal of an alleged violation of his right to priority consideration for restoration to

duty after full recovery from a compensable injury. Jurisdiction is asserted under 5 C.F.R. § 353.304(b). A hearing was held on June 4, 1998.

For the reasons set forth below, the appeal is DISMISSED for lack of Board appellate jurisdiction.

ANALYSIS AND FINDINGS

It is undisputed that the appellant was separated from his position with the Postal Service effective January 7, 1994, due to a compensable injury.[1] Record evidence establishes, and I find, that his compensation benefits began on or before April 14, 1994,[2] and ceased on December 15, 1997, because the appellant had fully recovered from the effects of his compensable injury.[3] On January 5, 1998, he timely requested priority consideration for reemployment with the Postal Service under 5 C.F.R. § 353.301(b), pertaining to full recovery more than one year after compensation began.[4]

In his appeal filed on February 28, 1998, the appellant alleges that the agency has effectively denied priority consideration, by requiring that he submit to medical and psychiatric evaluations as a condition of his reemployment. He also raises affirmative defenses of illegal discrimination, retaliation for prior EEO activity, and harmful procedural error. *See* IAF, Vol. 1, Tabs 1, 2; Vol. 2, Tabs 16, 17.

In response, the agency contends that no appealable action has been taken, in that priority consideration has not been denied; rather, the agency is in the process of

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[1] *See* Initial Appeal File (IAF), Vol. 1, Tab 11, Exhibit 1; Vol. 2, Tab 17, at 2.
[2] *See* id., Vol. 1, Tab 6, Subtab 14; Tab 11, Exhibit 2.
[3] *See* id., Vol. 1, Tab 2, at 2; Tab 6, Subtab 15.
[4] *See* id., Subtab 18.

determining whether the appellant satisfies the medical and other requirements necessary for reemployment. It also submits that this process has been delayed, in large part, by the appellant's own refusal to agree to the required evaluations. *See id.*, Vol. 1, Tab 6; Vol. 2, Tab 34.

The appellant bears the burden of proving that the Board has jurisdiction over this appeal, by preponderant evidence. *See* 5 C.F.R. § 1201.56(a); *Cox v. Merit Systems Protection Board*, 817 F.2d 100, 101 (Fed. Cir. 1987); *McCloud v. U.S. Postal. Service*, 71 M.S.P.R. 508, 511 (1996).

The appellant did not establish that any appealable action occurred; thus, he has not borne his burden of establishing Board appellate jurisdiction over the matter.

An excepted service employee, such as the appellant, who fully recovers[5] from a compensable injury more than one year after the date compensation began, is entitled to priority consideration for restoration to the position he left, or an equivalent one, under the procedures set forth in 5 C.F.R. Part 302. *See* 5 C.F.R. § § 353.301(b), 304(b) (1998); *Raicovich v. United States Postal Service*, 675 F.2d 417, 420-421 (Fed. Cir. 1982). Those procedures require that the agency place him on a priority reemployment list, and give him priority consideration over certain other job applicants for his former position or an equivalent one for which he qualifies, provided he requests reemployment within 30 calendar days after his compensation ceases. *See* 5 C.F.R. § § 302.303(b), 302.304(a). An agency may limit consideration granted at its discretion to applicants who

[5] "Fully recovered" means that "compensation payments have been terminated on the basis that the employee is able to perform all the duties of the position he or she left or an equivalent one." 5 C.F.R. § 353.102 (1998). An employee is generally deemed to be fully recovered when his OWCP benefits cease. *See Kimble v. U.S. Postal Service*, 47 M.S.P.R. 251, 254, *aff'd*, 945 F.2d 417 (Fed. Cir. 1991) (Table).

meet specific conditions, provided it makes those conditions a matter of record, and applies its policy uniformly to all eligible employees. *See* 5 C.F.R. § 302.303(a)(2). If the employee believes that he was denied restoration rights because of the employment of another person, he may appeal to the Board. *See* 5 C.F.R. § 302.501. See also *Welter v. Department of Transportation*, 73 M.S.P.R. 414, 420 (1997).

Here, the agency has admittedly hired others since January 1998, for positions in which it might have placed the appellant, had it not required that he submit to further, medical evaluation. *See* IAF, Vol. 2, Tab 17, at 2. At issue is whether the agency properly required the appellant to submit to the evaluation: if not, then the admitted hiring of other employees into positions for which he had priority, would bring the case within the Board's appellate jurisdiction under Part 353. *See Tisdale v. Department of the Treasury*, 44 M.S.P.R. 390, 394 (1990); *Benningfield v. Department of Transportation*, 21 M.S.P.R. 190, 192 (1984).

Joseph Gold, the Senior Personnel Training Specialist for the agency's Las Vegas District, testified that he directs the department that processes reemployment requests, and under the agency's regulations, even those who are entitled to priority consideration must be qualified before they can be rehired. Though no "one slot" is held for such applicants while the qualification process is completed, he tries to "move expeditiously" in such cases. In the appellant's case, Mr. Gold testified, he eliminated a number of the usual background and suitability checks, and asked only that the appellant provide an updated employment application, submit to drug testing, and undergo a medical evaluation. *See* Official Hearing Tapes (H.T.), testimony of Gold.

With respect to the latter, Betty Jean Miller, the Occupational Health Nurse Administrator for the agency's Las Vegas District, testified that she supervises medical evaluations for all applicants for reemployment, and under agency regulations, every applicant with a history of significant illness or injury is referred to a specialist before he or she is cleared for duty. She also testified that the appellant's injury was psychiatric in nature, and the medical clearance that he presented in support of his application did not meet the agency's published standards governing such cases, because it was not given by a board-certified psychiatrist. Further, she testified, it assumed certain facts she knew to be in error; i.e., several supervisors with whom the appellant had previously been in conflict were said to have left the workplace, when they were in fact still there. Accordingly, an additional, psychiatric evaluation was ordered. *See* H.T., testimony of Miller.

With regard to the timing of these events, the following is not in dispute. OWCP did not provide either the appellant or the agency with official notice[6] that compensation had ceased until February 17, 1998, or thereafter.[7] By letter dated February 24, 1998, Joe Gold requested an updated employment application.[8] On February 28, 1998, the appellant wrote to Mr. Gold, declining to provide one, and also filed the captioned appeal.[9] After more correspondence, the update was provided by the appellant on

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[6] The appellant testified that his request for reemployment dated January 2, 1998, was premised on the fact that he had not received his normal compensation as expected, and assumed this meant that compensation had ceased. *See* H.T., testimony of appellant.

[7] *See* IAF, Vol. 1, Tab 6, Subtabs 13-18.

[8] *See* id., Subtab 12. Mr. Gold testified that he requested only an application at that point, to assure that it did not include any new information, such as recent criminal convictions, that might be disqualifying in and of itself. *See* H.T., testimony of Gold.

[9] *See* id., Subtabs 10, 11.

March 6, 1998.[10] By letter dated March 11, 1998, the agency directed the appellant to report for a drug screen on March 16, 1998.[11] The laboratory then processed the sample, and on March 25,1998, he was found qualified for further employment consideration.[12] The appellant was then scheduled for a physical examination, to take place on April 6, 1998.[13] At that time, the examining physician found him physically fit, but referred him for "Specialist evaluation — Psychiatrist re: ability to perform for USPS given past history and current status." Accordingly, an appointment was scheduled with a psychiatrist for April 27, 1998.[14] By letter dated April 25, 1998, the appellant objected to this evaluation and initially refused to attend.[15] Further correspondence ensued, his objections were resolved, and by letter dated May 21, 1998 — the same day as the prehearing conference in this appeal — the appellant agreed to cooperate.[16]

Based on the foregoing, I find that the agency's actions were reasonable under the circumstances, and consistent with its normal practice. I find further that in asking the appellant to provide additional information, and submit to a psychiatric evaluation, it acted within its discretion under 5 C.F.R. § 302.303(a)(2), to set reasonable conditions on reemployment, even for those entitled to priority consideration. To the extent that the appellant complains of the ensuing delay, I find that it was caused, in large part, by his own reluctance to comply with these

[10] *See* IAF, Vol. 1, Tab 6, Subtab 8.
[11] *See* id., Subtab 7.
[12] *See* id., Subtab 4.
[13] *See* IAF, Vol. 1, Tab 6, at 1 ("Correction, etc."); *id.*, Subtab 1, at 3. Mr. Gold testified that the drug screen was also potentially disqualifying, in and of itself, and therefor had to be ordered separately. *See* H.T., testimony of Gold.
[14] *See* IAF, Vol. 2, Tab 15, Subtab 28, 29; H.T., testimony of appellant.
[15] *See* id., Vol. 1, Tab 8, Subtab 20.
[16] *See* id., Vol. 2, Tab 15, Subtab 30.

requests. Thus, the appellant has not established that the agency's actions prior to February 28, 1998, when this appeal was filed, or at any time since that date, constituted an effective denial of priority consideration, over which the Board may assume jurisdiction. *See Benningfield*, 21 M.S.P.R. at 191-92; *Tisdale*, 44 M.S.P.R. at 394.

As there is no appealable matter before the Board, this is not a "mixed case," and the appellant's affirmative defenses of illegal discrimination, retaliation for prior EEO activity, and harmful procedural error are not within the Board's jurisdiction. *See* 5 C.F.R. § 1201.15 1(a)(1); *Cruz v. Department of the Navy*, 934 F.2d 1240, 1245-46 (Fed.Cir. 1991). Accordingly, I do not address those defenses, and do not provide the appellant with mixed case appeal rights. *Id.*

DECISION

The appeal is DISMISSED.

FOR THE BOARD: /s/ Philip D. Reed
Philip D. Reed
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on July 24, 1998, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board, However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Room 806
Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be postmarked, faxed, or hand-delivered no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of

issuance, 30 days after the date you actually receive the initial decision. If you fail to provide a statement with your petition that you have either mailed, faxed, or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board is final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 30 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

U.S. Const. amend. I:

Congress shall make no law requesting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

5 U.S.C.S. § 7702. Actions involving discrimination:

(a)(1) Notwithstanding any other provision of law, and except as provided in paragraph (2) of this subsection, in the case of any employee or applicant for employment who —

(A) has been affected by an action which the employee or applicant may appeal to the Merit Systems Protection Board, and

(B) alleges that a basis for the action was discrimination prohibited by —

(i) section 717 of the Civil Rights Act of 1964 (42 U.S.C.S. 2000e-16),

(ii) section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)),

(iii) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791),

(iv) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), or

(v) any rule, regulation, or policy directive prescribed under any provision of law described in clauses (i) through (iv) of this subparagraph,

the Board shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures under section 7701 of this title and section.

(2) (not applicable)

(3) Any decision of the Board under paragraph (1) of this subsection shall be a judicially reviewable action as of —

(A) the date of issuance of the decision if the employee or applicant does not file a petition with the Equal Employment Opportunity Commission under subsection (b)(1) of this section, or

(B) the date the Commission determines not to consider the decision under subsection (b)(2) of this section.

5 U.S.C.S. § 7703. Judicial review of decisions of the Merit Systems Protection Board:

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or

decision of the Merit Systems Protection Board may obtain judicial review of the order or decision,

(2) The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 60 days after the date the petitioner received notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under section 7702.

(c) In any case filed in the Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be —

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence; except that in the case of discrimination brought under any section (is) referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trail *de novo* by the reviewing court.

5 U.S.C.S. § 8128. Review of award:

(a) The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review, may —

(1) end, decrease, or increase the compensation previously awarded; or

(2) award compensation previously refused of discontinued.

(b) The action of the Secretary or his designee in allowing or denying a payment under this subchapter [5 U.S.C.S. § § 8101 et seq.] is —

(1) final and conclusive for all purposes and with respect to all questions of law and fact; and

(2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

5 U.S.C.S. § 8151. Civil service retention rights:

(a) In the event the individual resumes employment with the Federal Government, the entire time during which the employee was receiving compensation under this chapter [5 USCS § § 8101 et seq.] shall be credited to the employee for the purposes of within-grade step increases, retention purposes, and other rights and benefits based upon length of service.

(b) Under regulations issued by the Office of Personnel Management —

(1) the department or agency which was the last employer shall immediately and unconditionally accord the employee, if the injury or disability has been overcome within one year after the date of commencement of compensation or from the time compensable disability recurs if the recurrence begins after the injured employee resumes regular full-time employment with the United States, the right to resume his former or an equivalent position, as well as all other attendant rights which the employee would have had, or acquired, in his former position had he not been injured or disabled, including the rights to tenure, promotion, and safeguards in reductions-in-force procedures, and

(2) the department or agency which was the last employer shall, if the injury or disability is overcome within a period of more than one

year after the date of commencement of compensation, make all reasonable efforts to place, and accord priority to placing, the employee in his former or equivalent position within such department or agency, or within any other department or agency.

29 U.S.C.S. § 705. Definitions:

(20)(B) Certain programs; limitations on major life activities. Subject to subparagraphs (C), (D), (E), and (F), the term "individual with a disability" means, for purposes of section 2, 14, and 15, and titles II, IV and VII of this Act [29 U.S.C.S. § § 701, 714, 715, 760 et seq., 780 et seq., 791 et seq., 796 et seq.] any person who —

(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities;

(ii) has a record of such an impairment; or

(iii) is regarded as having such an impairment.

29 U.S.C.S. § 794. Nondiscrimination under Federal grants and programs:

(a) Promulgation of rules and regulations. No otherwise qualified individual with a disability in the United States, as defined in section 7(20) [29 U.S.C.S. § 705(20)], shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C.S. § 794a. Remedies and Attorneys' Fees:

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint.

42 U.S.C.S. § 2000e-2. Unlawful employment practices:

(a) Employer practices. It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C.S. § 2000e-3. Other unlawful employment practices:

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate

against any member thereof or applicant for membership, because he has opposed any practice made any unlawful employment practice by this title [42 U.S.C.S § § 2000c-2000e-17], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title [42 U.S.C.S. § § 2000c-2000e-17].

42 U.S.C.S. § 2000e-5(f)(3). Enforcement provisions:

Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title [42 U.S.C.S. 2000e et seq.].

42 U.S.C.S. § 2000e-16. Nondiscrimination in Federal Government employment:

(a) Discrimination prohibited. All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military department as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the General Accounting Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) (not applicable)

(c) Civil action by party aggrieved. Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a) [subsec. (a) of this section], or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his compliant, may file a civil action as provided in section 706 [42 U.S.C.S. § 2000e-5], in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

5 C.F.R. § 302.202. Qualification requirements:

Before making an appointment to a position covered by this part, each agency shall establish qualification standards such as those relating to experience and training, citizenship, minimum age, physical condition, etc., which shall relate to the duties to be performed. An agency may delegate the establishment of standards relating to a group of positions or a specific position to the appropriate administrative level or subdivision in accordance with the needs of the locality in which the position is located, but the agency shall determine that each standard established

is in conformity with this part. Each agency shall make its standards a matter of record in the appropriate office of the agency, and shall furnish information concerning the standards for a position to an applicant on his/her request. Each agency shall apply the standards for a position uniformly to all applicants, except for such waivers as are provided in this part for a preference eligible.

5 C.F.R. § 302.303. Maintenance of employment lists:

(a) Establishment —

(1) Agency obligation. An agency must establish a priority reemployment list whenever any applicants rated eligible under § 302.302 meet the conditions set out in paragraphs (b)(1) through (b)(3) of this section and must consider candidates from that list in accordance with § 302.304(a). All applicants not included on the priority reemployment list will be listed on the regular employment list unless the agency elects to establish a reemployment list as provided in paragraph (c) of this section.

(2) Agency discretion. In establishing its lists, an agency may, but is not require to: Afford priority consideration to non-preference eligibles who meet the conditions set out in paragraph (b)(4) of this section; afford priority consideration under paragraph (b) of this section for a longer time and/or in a broader geographic area than the minimum requirement; and/or provide reemployment consideration after the priority list is exhausted to additional current and former employees in accordance with paragraph (c)

of this section. An agency may limit consideration granted at its discretion to applicants for specific positions or applicants who meet specific conditions, but must make those conditions a matter of record and must apply its policy uniformly to all eligible employees.

5 C.F.R. § 302.501. Entitlement:

An individual who is covered by 5 U.S.C.S. 8101(1) and is entitled to priority consideration under this part (see § 302.103) may appeal a violation of his/her restoration rights to the Merit Systems Protection Board under the provisions of the Board's regulations by presenting factual information that he or she was denied restoration rights because of the employment of another person.

5 C.F.R. § 339.301(e). Authority to require an examination:

(1) An agency may order a psychiatric examination (including a psychological assessment) only when:

(i) The result of a current general medical examination which the agency has the authority to order under this section indicates no physical explanation for behavior or actions which may affect the safe and efficient performance of the individual or others, or

(ii) A psychiatric examination is specifically called for in a position having medical standards or subject to a medical evaluation program established under this part.

(2) A psychiatric examination or psychological assessment authorized under (i) or (ii) above must

be conducted in accordance with accepted professional standards, by a licensed practitioner or physician authorized to conduct such examination, and may only be used to make legitimate inquiry into a person's mental fitness to successfully perform the duties of his or her position without undue hazard to the individual or others.

5 C.F.R. § 339.303. Examination procedures:

(a) When an agency orders or offers a medical examination under this subpart, it must inform the applicant or employee in writing of its reasons for doing so and the consequences of failure to cooperate. (A single notification is sufficient to cover a series of regularly recurring or periodic examinations ordered under this subpart.)

(b) The agency designates the examining physician or other appropriate practitioner, but must offer the individual an opportunity to submit medical documentation from his or her personal physician or practitioner. The agency must review and consider all such documentation supplied by the individual's personal physician or practitioner.

5 C.F.R. § 353.104. Notification of rights and obligations.

When an agency separates, grants a leave of absence, restores or fails to restore an employee because of uniformed service or compensable injury, it shall notify the employee of his or her rights, obligations, and benefits relating to Government employment, including any appeal and grievance rights.

5 C.F.R. § 353.301(b).Restoration rights, Fully recovered after 1 year:

Any employee who separated because of a compensable injury and whose full recovery takes longer than 1 year

from the date eligibility for compensation began (or from the time compensable disability recurs if the recurrence begins after the injured employee resumes regular full-time employment with the United States), is entitled to priority consideration, agencywide, for restoration to the position he or she left or an equivalent one provided he or she applies for reappointment within 30 days of the cessation of compensation. Priority consideration is accorded by entering the individual on the agency's reemployment priority list for the competitive service or reemployment list for the excepted service.

5 C.F.R. § 1201.3. Appellate jurisdiction.

(a) Generally. The Board has jurisdiction over appeals from agency actions when the appeals are authorized by law, rule, or regulation. These include appeals from the following actions.

(1) - (12) (omitted)

(13) Employment of another applicant when the person who wishes to appeal to the Board is entitled to priority employment consideration after a reduction-in-force action, or after partial or full recovery from a compensable injury (5 C.F.R. 302.501, 5 C.F.R. 330.209).

29 C.F.R. § 1630.2. Definitions.

(g) Disability means, with respect to an individual —

(1) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(2) A record of such an impairment; or

(3) Being regarded as having such an impairment.

29 C.F.R. § 1630.10. Qualification standards, tests, and other selection criteria:

It is unlawful for a covered entity to use qualifications standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, on the basis of disability, unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.

29 C.F.R. § 1630.13. Prohibited medical examinations and inquiries:

(a) Pre-employment examinations or inquiry. Except as permitted by § 1630.14, it is unlawful for a covered entity to conduct a medical examination of an applicant or to make inquiries as to whether an applicant is an individual with a disability or as to the nature or severity of such disability.

U. S. Postal Service Employee and Labor Relations Manual § 546.13, Issue 12, dated 05/01/89:

131. Obligation. When an employee has fully overcome the injury or disability more than 1 year after compensation began, the USPS must give an employee priority consideration for reemployment into the former position or an equivalent one. The names of all former employees who fully recover from their compensable disabilities more than 1 year after compensation begins must be entered on a reemployment list in two groups:

a. Group one will include all those former employees who are entitled to 10-point veteran preference.

b. Group two will include all other former employees who fully recover from their compensable

disabilities in more than 1 year. Persons in group one will be considered for employment before persons in group two; and persons in group two will be considered before other sources of recruitment, such as transfers from other agencies, reinstatements, or appointments from hiring registers.

132. Rights and Benefits. Rights and Benefits are the same as those outlined in 546.122 (Upon reemployment, all rights and benefits that an employee would have had or acquired in the former position had there been no injury or disability must be restored.)

Letterhead of Norton A. Roitman, MD

Psychiatric Examination
12/16/99

Ronald L. Green
SSN 332-46-8451

Mr. Green was required to undergo this psychiatric examination in consideration of reinstatement of employment in the face of his past dysthymia and workplace controversies. In the past, agreements have been reached between him and his employer, the United States Postal Service, which left him disabled and dismissed. At this juncture, Mr. Green claims that he has achieved a higher level of mental health through therapeutic efforts and real life activities which have brought him experiences and personal growth.

His employer expresses concerns of continued maladaptation between him and critical personnel in his workplace attributing the problems to Mr. Green's continued uncooperative attitude and resistance to follow the directives, implicit and explicit, of persons in authority.

The purpose of this examination is to establish the status of Mr. Green's mental health and to determine, from a psychiatric perspective, Mr. Green's fitness for reemployment.

Sources or information:

Review of Psychological Systems
Psychiatric History Inventory
Registration
Release of Information

Application for Employment

Job Description and functional requirements for Mr. Green's requested position

Administrative records reflecting Mr. Green's past and recent difficulties from the perspective of supervisors including:

A copy of Mr. Green's NEGOTIATED SETTLEMENT dated December 7, 1993

The analysis of the Administrative Judge reviewing Mr. Green's APPEAL

Communications from Mr. Green pertaining to his stress claim dated November 12, 1991 and May 26, 1992 with attached statement

A memo by Customer Services Manager dated February 17, 1994

Statements prepared by Clerk Steno, Senior Labor Relations Specialist, and Human Resource Associate reflecting an incident in which Mr. Green was involved on February 17, 1994

A letter signed by Chuck Noble, Maintenance Manager dated March 12. 1996

A letter signed by Patricia Hansen dated September 23, 1997

Communication from the Occupational Health Nurse

Communications and medical record excepts from Mr. Green's treating psychologist Sean Zielinski, Ph.D, and treating psychiatrist. Dr. Van Valkenburg

Evaluations of psychiatrists William Pike M.D. and Joyce Oates M.D.

I discussed the nature of this examination with Ms. Betty Miller with Mr. Green's verbal consent. She referenced specific documents in the administrative and medical file indicating continued conflict and legalistic arguing around procedures, including this independent examination. She also stated that not all the managerial personnel with whom Mr. Green had conflict with were absent in contradiction to the claim of his treating psychologist, Dr. Zielinski and Mr. Green himself.

Limitations

I informed Mr. Green that this examination was for the purposes of preparing a report to the USPS and therefore there would be no assurance of confidentiality. This was not to be the initiation or continuation of any treatment. I also informed him I would be reviewing available collateral documents supplied to me by the postal service.

We touched on the conflict of interest he perceived me as being in, given I have had prior involvement in his case and also, as was quoted in his treatment record with Dr. Van Valkenburg, "They want to send me to another psychiatrist, one of their choosing". He has been referred to Norman Roitman. "He has been on their payroll for years." (May 11, 1998).

History

Mr. Green record and self report reflect that he has suffered from psychological stress resulting in his partially accepted claim of mental impairment due to dysthymic disorder. He has assigned responsibility for his stress to his treatment by supervisory employees of the United States postal Service.

During this examination, Mr. Green reflected that his activities with his employer had been partly his problem

as he engaged in 'causes' to an extent sometimes inappropriate. He reports that some of his activities were futile and through his therapy and personal growth, he believes he can now use better judgment.

Part of his change came about, he claims, from his success at law school where he discovered his capacities and increased his esteem. Though his new found perspective he implies that his advocacy in the past was sometimes motivated by inner struggles engendered by feelings of inadequacy and fueled by indignation about his perception of unfairness.

For the last several years he has become motivated to be reinstated as a USPS employee for the expressed purposes of reestablishing the line of benefits and seniority which would forward him financially. Toward this goal he has enlisted the support of his treating psychologist and psychiatrist, as well as obtaining independent psychiatric studies by Drs. Oates and Pike. Dr. Pike was especially impressed with Mr. Green's advancements as in his evaluation of 1996 he stated, "Thus I feel Mr. Green is probably still disabled for the United States Postal Service and should never again work there", but in his subsequent 1998 report finds him "free of mental illness . . . and should be accepted back in his post office employee status as there are not any limitations from the psychiatric standpoint."

In addition to Dr. Pike, the other mental health specialists have become advocates for his reemployment. The majority of their data was generated from Mr. Green himself. They looked at the issues from his perspective and commented on how much better he is at handling stress as well as referring to the absence of stress provoking managerial personnel from the workplace.

From the perspective of a component of the presently employed managerial staff as represented in some of the communications surrounding the incident of physical contact and refusal to comply with authority limits (February 17, 1994), and a verbal altercation with Ms. Hansen on September 23, 1997, difficulty directing Mr. Green continues. Mr. Green continues to challenge directives, resist procedures and demand justification before cooperating, requiring uncustomary efforts by managerial personnel to handle his reinstatement requests. There continues to be an atmosphere of conflict and ill-will.

I engaged Mr. Green up front in discussions about this atmosphere and the past events as documented. He defended himself, claimed his rights, and blamed others. He also stated that with the clearer perspective achieved in his success in law school, he has learned to pick his battles. Importantly, he defines his goal as reinstatement and does not necessarily want to continue in his applied - for position as stock clerk and sees it as a stepping stone to higher levels. In this more or less temporary position, he expresses confidence that he will not become embroiled in lower level conflict and advocacy for rights on what have sometimes been inconsequential matters and keep his focus on the bigger picture.

Treatment history contains ongoing sessions with his psychologist at the VA facility in Las Vegas with occasional contact while in San Diego for law school. In addition, he reports a course of Prozac which was terminated a few years ago (1995) because of the disappearance of symptoms.

His mental health providers reinforced the judgment that Mr. Green's condition was basically a maladaptation on his part to work related stress. They use as a foundation to their impression that he has successfully maintained good work relationships in his role as compliance

assurance employee in his position with the State of Nevada (employment records from this position were not available).

On Review of Psychological Systems he reports a diminution of depressive symptoms. While previously he claims weeks worth of depressed mood with apathy and excessive sleep, irrational guilt, isolation and quick to tears, now he claims none of the above. He denies any other psychological symptomatology.

He also denies any use of substances whatsoever, past or present. He is a practicing Catholic, denies work related claims other than the dysthymic disorder, and denies any sources of stress, difficulties with addictions, gambling or legal problems.

He lists his strengths as his personality, intelligence, interest in church, friends and billiards.

Medically he takes treatments for hypertension by Dr. Leon ("Fosinopril, Hydrochlorothyazide, and Penadel") and no ongoing treatment for dysthymia. He drinks up to two caffeinated beverages a day. In the past he has had childhood asthma and allergies.

No developmental difficulties are noted.

Mental Status Examination

Mr. Green presented in a very professional and well controlled manner. He was focused on his intention of re-establishment of employment, and in this regard and this setting he exhibited good ego strength and self control. In addition, when discussion surrounding his past perception of the possibility of my conflict of interest, he maintained his composure and good manner.

Because of the history of claim of dysthymia severe enough to inhibit work, and the linkage his providers

made between workplace stress and his psychopathology. I looked for indicators of persistent dysthymia (a chronic illness), and for posttraumatic stress phenomena. None were found.

Because secondary gain is so high in this individual, I looked for clinical indicators of malingering. Minimalization was detected in regard to current status in the self report section of childhood characteristics, but this is not out of the ordinary in regard to fitness-for-duty type examinations.

There was a blatant secondary gain effect apparent in content. There was no spontaneous discussion regarding the mission of the postal service and how he would fit into it. His concerns were self focused. This in itself is not indicative of any acute psychopathology but is more representative of character.

Discussion

His perception of resistance on the part of his former employer and his personal advocacy for himself is subject to interpretation. Circumstances such as he presents are feasible and cannot be automatically considered paranoid or suspicious. What can be said is that he conceptualizes the situation of employment as one of rights and advocacy as opposed to the more usual way employees look at things as work duties, compensation, and demonstrating capacity to fulfill job requirements.

Although less than previously, his tendency to project his difficulties into workplace personnel remains. This qualifies as a defensive mechanism. He has higher order defenses of rationalization and intellectualization as well.

Mr. Green's case represents an overlap of employee rights and mental illness considerations. The matter of reemployment rests on his ability to get along with supervisory personnel and reduce to a reasonable degree the

matters of rights, privileges and structure of the work-place rules and regulations. He has a profound history of conflict which has been conceptualized by him, and to some degree accepted as a function of a mental illness. His reinstatement hinges on the authenticity of the prior mental illness, the amelioration of that condition, and the ability to adjust to future circumstances.

Recent history demonstrates continued challenge to authorities and demand on the part of managerial personnel to justify and support directives. Legalistically this appears to be within his rights. From a mental health perspective, it shows that whatever his previous condition has been diagnosed as, it is still active.

What stimulates his propensity for conflict is a matter of his character rather than any acute psychiatric condition. This diagnostic formulation has not been addressed by any of his providers except to list an absence of a personality disorder. However, their diagnostic procedures are devoid of personality testing and are based on clinical impression. Also, they are, as treating providers, subject to bias on behalf of their client. Doctors try to do what is best for their patient, and from his perspective, especially financially, reinstatement is in his best interest. There is no documentation that focuses purely on the presence or absence of character pathology other than the listing on Axis II of the diagnosis section.

His disorder appears to be of a narcissistic nature, with himself and his self concerns the center of his mindset. How things effect him (his feelings and his rights) are the way he conceptualizes his world. When talking only to him, one is prone to adopt his view of situations. That is why his advocating providers have deemed the supervisory personnel and the workplace as the source of his psychopathology. An independent and objective study of his make-up and the environment

might have led to a much different opinion as to why he has decompensated in the past, and his prognosis for sustaining his mental health in the future.

The question has to be asked as to why this individual, as opposed to so many other Postal Service employees, suffered such adjustment difficulties. Once this question is answered it can be better predicted as to whether or not he will decompensated in a similar fashion in the future. His decompensation was one in which he took personal offense, poorly processed his anger, became passive aggression, adopted victimization stances, and used procedural pathways to channel his feelings and aggression. Thus his workplace becomes the theater for the reenactment of his personal psychological drama. The vast majority of employees just go to work, accept limitations, file grievances when needed, and get on with their life. Mr. Green's life becomes the grievances. His providers empathized with his position and formulated their opinions in the service of what they perceived would make him feel better. In the past, leaving work and being compensated was the recommendation. Now, as his needs change, they see returning to work to be his remedy.

This is suggestive of a narcissistic personality disorder with decompensation to dysthmia. He reconstituted once the narcissistic injury is reversed. Unfortunately, the narcissistic personality is a very difficult disorder to ultimately heal. No medications can reverse it. Some of its symptoms can be controlled in the manner that an antihistamine controls cold symptoms but does not cure the virus.

Relationship problems are a hallmark of this disorder, and Mr. Green's multiple problems with supervisors and marriages all speak in support of this as a functional style in his approach to relationships in general.

His view of his position as a stepping stone to furtherance of himself, to a certain degree is expected and normal, but in his case represents a lack of concern for the community in which he operates and a defect in empathy which gets him into so much trouble with others. When he doesn't get his way he protests as a reflex rather than consider all sides and seek compromise and peace. He personalizes problems and projects systemic and bureaucratic problems into individuals.

While not qualifying as an acute psychiatric condition, the narcissistic individual will likely reexperience these dramas, feel and spread peaked emotion, and then regress. His rationalization and passive aggression combines with his legal and intellectual prowess. He uses these instruments to serve his psychological needs. But his feeling of attachment, loyalty and affiliation are sparse.

The psychiatric opinion addresses his job description in the area of relationships with supervisory personnel. He has a propensity toward difficult relationships with authority. The closer proximity and the longer term the relationship. the greater chance his personal 'baggage' will be assigned to the person that frustrates him or his way of seeing things. That is why persons such as he frequently have to run their own businesses and find it difficult to take direction and adjust to the demands of their community, family or workplace.

They are prone to feelings of alienation and isolation and depression which can reoccur. They try to recruit people to their point of view, and as talented and articulate as he is. Mr. Green has success at his with his psychiatrists and psychologists.

This diagnosis pulls together his past dysthymia and adjustment difficulties extreme enough to lead to his dismissal. The diagnosis takes into account his efforts at resurrection of his status, his choice of the legal profession as a weapon in the service of his psychological needs, and his impressive success in his pursuits. It also portends several reactions.

For instance, if this report does not agree with his perceptions or does not conform with his goals. He will challenge it. He will find justification for his appeal. He will not recognize his propensity as a function of any psychiatric condition because his lack of insight into his condition.

Narcissistic personality in and of itself is not a disabling condition. However, it makes him vulnerable to deterioration of mood and subject to disturbing angry feelings which are difficult to resolve or contain.

He has matured through his achievements and may not be as prone to decompensation as in the past. Nevertheless he manifests clinical elements of the personality disorder. The dysthymia was secondary to his personality disorder and he remains vulnerable to such upset.

He has demonstrated in recent history his propensity toward legalistic conflict and although it may be within his rights to do such, it may not constitute good judgment and workplace etiquette. He may not perceive his responsibility all the time in regard to maintaining good relationships with superiors and therefore it is perfectly understandable why managerial personnel are reluctant to welcome him back into a situation that has a good chance to become uncomfortable once again. They would naturally resist the feeling of being used for his own personal purposes as a stepping stones to another position. They don't want to

spend the energy to reinforce the structures which most other employees take for granted.

There is a strong chance that these types of difficulties will be reexperienced. It is possible, although I do not have a description of his current duties, that in his compliance assurance position now, he is in the field a lot. This would tend to reduce the degree of complaint and conflict he would have with his workplace. Many people with his same profile do become professionals and operate independently of a cooperative working environment, including doctors and lawyers and top businessmen. His achievements are sometimes enhanced by strivings for recognition. approval and aggrandizement.

I find that he is currently, based solely on mental status examination and interview, to have the capacity to present in a psychologically health manner. The question I have is whether or not the pull of the anger and feelings of frustration and disappointment, and the atmosphere of the working environment based on a painful (to him and others) history will be toxic enough to cause a regression of his character and cause him to use his legal prowess to rectify what he perceives as wrongs. The option to put limitations on his grievances, appeals and filings as a condition for reemployment may not be available. Such restrictions might, in the opinion of work-related rules and regulations, constitute a restriction of rights. However, the purpose of his position is to perform duties pertaining to schedules and maintenance at Postal Service installations rather than activism and advocacy. The reticence the employer has to rehire a person who may drain administrative resources away from the mission of the agency is understandable.

Therefore the decision to rehire in some ways represents the commitment to keep on someone with the sophistication to attack structures and practices. He has a

demonstrated history of such peripheral involvements, a claim of blame and disability due to his proposition of administrative harassment and his resultant victim role. And he has a personality disorder which drives all this.

To the best of my medical ability at his point, I think it is more likely than not that difficulties will again surround this employee if rehired unless he is supported through an acceptable therapeutic alliance and through this therapeutic relationship, chooses to work on himself instead of working on his supervisors. The other way to avoid conflict is to always give him his way which of course is impractical..

In short, he shows evidence of a continued disability at the root level of his dysthymia, which is his personality disorder. The disability effects his capacity to be supervised, accommodate and compromise, and overall, adjust to the employee role.

Whether or not he will resist exercising rights in the service of his personality disorder remains to be seen. Recent evidence suggests that the pull to challenge, demand and exercise rights in this manner continue. Since his treatment team has not recognized his baseline pathology, it has been recruited in the service of his narcissism. Thus is understandable. In good supportive therapy such as he has received, there is no reason to investigate the veracity of claims and perceptions. The person's psychology is accepted at face value and strengthened. The provider remains isolated from the workplace and the veil of confidentiality enforces the separation between the psychological world and the real world.

But without effective treatment that addresses his core pathology, he likely will be quickly be reassigned elsewhere, possibly to act out his inner feelings in another station. Then the question is whether or not he will be

able to stem his tendencies against his new supervisor and redirect his energies into his duties or reproduce in him and those around him the aggravation he has in the past.

Prediction of future violence is predicated on past violence. Using this precedent as the power for prediction in this case, it is likely conflict will recur. The gain in esteem as acquired through his achievements in law school are not sufficient to undo the long standing propensity of past personality formation. Usually, the esteem has to be repeatedly buttressed in order to maintain high functioning. The psychotherapy in regard to improved coping mechanisms can be helpful, but I am concerned that the focus of the source of his pathology remains identified as being the workplace rather than within his constitution. If it were really a toxic workplace, one would expect all postal employees to be disabled to the point of termination. The problem was and is within him, as accepted by the termination agreement. And treatments he received are not predicted to ameliorate the underlying personality disorder. In this sense, it is not good for him to undergo a reexperience of the disabling conditions which were not particular managers, but the workplace itself.

Recommendations

Despite his problems, he might be able to conform to the job description. He is at risk however, of being at the center of conflict, whether or not he can be assigned to be the direct cause of it.

Since it is likely my conclusions and objectivity will be questioned, an evaluation by a psychologist knowledgeable with workplace dynamics, disability and compensation issues, and who can appreciate the complexities of the personality disorders can be the next step, using testing instruments to establish the presence or absence of a personality disorder.

Once the diagnosis is established, it may still be possible for him to be employed, providing he receives ongoing psychological support by a therapist who appreciates the significance of his disorder, the role it plays in workplace difficulties, and who works with him in keeping his symptoms and propensities under control.

Conclusion

Although he claims to be asymptomatic and that the sources of workplace stress has been eliminated, the core psychological difficulty which rests within hir remains.

Reconsideration can take place if the psychological evaluation and testing by a practitioner who is truly independent finds evidence to refute the finding of personality pathology.

The other route to reemployment would be treatment specific to his psychological problem. As a result of this he should have more insight and demonstrate resistance to his tendency to be distracted from his work assignments and focus in on his job description and enhancing his organization. His narcissistic tendencies need to be managed rather than indulged, his empathy improved, and maintain a mature manner of interrelationships regardless of his gripes. Just because he has the right to file, write letters, and question authority at every turn does not mean it is psychologically healthy to do such. His pathology manifests interactively and he avails himself of the tools which on some levels look appropriate. but which can be misused as well in the service of obstreperous conflict.

Norton A. Roitman. MD

Letterhead of Marv A. Glovinsky, Ph.D. Cht'd.
BEHAVIORAL MEDICINE ASSOCIATES

September 1, 2000

Nancy E. Killeen, Esq.
633 South 4th Street - Suite 2
Las Vegas, Nevada 89101

RE: Ron GREEN
(Fitness For Duty Evaluation)

Dear Ms. Killeen:

Mr. GREEN, your client reportedly involved in a rather drawn out legal action against the United States Postal Service, contacted me requesting the rendering of an INDEPENDENT PSYCHOLOGICAL OPINION regarding his ability to return to work as a Postal Service employee. According to GREEN, corroborated by the information that he provided me with for review, in approximately 1992 he found himself unable to perform his duties as a maintenance control and stock clerk at a postal installation in our city. He then sought treatment for (t)his condition, subsequently diagnosed as a DYSTHYMIC DISORDER. Thereafter, GREEN has reportedly been treated successfully for (t)his reactive mood disorder In consequence, three treating psychiatrists and his one psychologist-therapist have attested to his capacity to return to full-time employment with the U.S. Postal Service.

On the other hand, Norton Roitman, M.D., a local psychiatrist who conducted an examination of GREEN at the behest of the Postal Service reportedly determined that GREEN actually demonstrates a NARCISSISTIC

PERSONALITY DISORDER. The DYSTHYMIC DISORDER that GREEN had suffered from in the past was hypothesized by Dr. Roitman to have actually resulted from this NARCISSISTIC PERSONALITY DISORDER. More specifically, the decompensation of narcissistic defenses in reaction to supposedly average and expectable work place stressors was said to have precipitated GREEN's emotional disablement.

> "The problem was and is within him.... And treatments he received are not predicted to alleviate the underlying personality disorder. In this sense, it is not good for him to undergo a reexperience of the disabling conditions which were not particular managers, but the workplace itself... Despite his problems he might be able to conform to the job description. He is at risk however, of being at the center of conflict, whether or not he can be assigned to be the direct cause of it."

INTERESTINGLY Dr. Roitman offered an additional opinion in (t)his "Psychological Examination," dated 12/16/99, apparently based upon the assumption that (t)his diagnosis accurately characterized GREEN's mental status. Dr. Roitman, in effect, suggested that these four other treating professionals had missed the proverbial mark in concluding that GREEN was fully capable of performing the duties of a Postal Service employee.

> "Since it is likely my conclusion and objectivity will be questioned, an evaluation by a psychologist knowledgeable with workplace dynamics, disability and compensation issues, and who can appreciate the complexities of the personality disorders can be the next step, using testing instruments to establish the presence or absence of a

> personality disorder.... Once the diagnosis is established, it may still be possible for him to be employed, providing he receives ongoing psychological support by a therapist who appreciates the significance of his disorder, the role it plays in workplace difficulties, and who works with him in keeping his symptoms and propensities under control."

In a letter to you referencing "Green v. Henderson," dated 27 June 2000, David C. Bachman, M.D., FACS, then reiterated Dr. Roitman's opinion and recommendations. Hence the explicit reason for my having been asked to participate in GREEN's case at this point in these proceedings.

> "... that Mr. Green suffers from a narcissistic personality disorder with decompensation to Dysthymic in the past.... We have accepted Dr. Roitman's diagnosis of personality disorder as appropriate and have no disagreement with his opinion.... The next step would be for Mr. Green to undergo psychological testing by an independent psychologist knowledgeable in workplace dynamics, disability and compensation issues, and familiar with personality disorders.... if Mr. Green disagrees with this diagnosis it would be his option to secure the independent psychological testing to support his contention that his diagnosis is in error."

The documentation that I was made privy to prior to conducting (t)his examination included:

> (1) Letter Of Recommendation For Ronald L. Green, dated August 11, 1993, submitted by Al Scott, Manager, Operations Support, U.S. Postal Service;

(2) Statement of Accepted Facts In The Case Of Ronald L. Green, dated December 9, 1993;

(3) Psychiatric Evaluation(s), submitted by Win. B. Pike, M.D., dated December 24, 1993, June 18, 1996, August 14, 1998;

(4) Psychiatric Evaluation, submitted by Joyce M. Oates, M.D., dated 30 October 1996;

(5) Psychiatric Evaluation, submitted by Chas. Van Valkenburg, M.D., dated February 12, 1998;

(6) Psychological Evaluation(s), submitted by Sean Zielnoki, Ph.D., Lic. Clin. Psych. (Py 171), dated July 30, 1997, November 14, 1997, May 17, 1999;

(7) Letter in behalf of Ronald L. Green, dated March 13, 1998, submitted by Rick Hackman, Manager, Division of Consumer Relations, Public Service Commission Of Nevada, Regulatory Operations Staff;

(8) Letter(s) in behalf of Ronald L. Green, dated March 13, 1998, January 5, 1999, submitted by Barry Holt, Senior Consumer Investigator/Representative, Public Service Commission Of Nevada, Regulatory Operations Staff;

(9) Psychiatric Examination, submitted by Norton A. Roitman, dated 12/16/99;

(10) Letter referencing Green v. Henderson, submitted by David C. Bachman, M.D., FACS, dated 27 June 2000;

(11) Letter referencing Green v. Henderson, submitted by Nancy E. Killeen, Esq., dated June 8, 2000;

(12) Work Performance Standards, U.S. Postal Service, Occupation Code 0301-19;

(13) Application For Employment/Personal Resume of Ronald L. Green, J.D.

In addition to reviewing these above listed exhibits my INDEPENDENT PSYCHOLOGICAL EXAMINATION consisted of a Mental Status Examination (MSE) and Formal Psychodiagnostic Assessment including the Hand Test, Forer Structural Sentence Completion Test - Form W, Proverb Test - Form III, Symptom Checldist-90-Revised (SCL-90-R), Multiaxial Diagnostic Inventory: Personality Scales, Emotions Profile Index, Millon Clinical Multiaxial Inventory (MCMI-Ill), Minnesota Multiphasic Personality Inventory (MMPI-2).

At issue in this case are four basic questions, namely: (1) does GREEN evidence a personality disorder?; (2) has GREEN's depression been resolved?; (3) is there any reason to believe that GREEN will, again, decompensate in reaction to the stresses posed by the Postal Service environment?; (4) will GREEN prove a disruptive influence in a Postal Service setting?

Thinking about personality and personality disorders is both important and difficult. These topics are at the core of our humanity and our individuality at the same time that they are actually resistant to a comprehensive and reliable description and explanation. The definition of personality, the classification of personality traits and types, even the distinction between healthy and disordered personalities still defies agreement. Too little is known about what shapes personality, and the studies of its pathologies is essentially in its infancy.

Personality as a construct implies that individual attitudes and behavior differ characteristically or stylistically in ways that persist through different situations and over

extended periods of time. These traits or habits by definition are thus attitudes toward self, others and the environment expressed in a person's cognition or thoughts, emotions or feelings and behaviors. But it can be difficult to distinguish personality from moods and anxieties, stress responses, imposed or adopted social roles and the (a)effects of an acute situation or circumstance. A personality type or coping response can also be misinterpreted with an adaptation to a destructive environment. And since personality is by definition persistent, understanding personality referencing GREEN in this instance requires some knowledge of his past outside of the POSTAL SERVICE setting in order to be able to have confidence in the Axis II diagnosis posited by Dr. Roitman as GREEN's destiny.

Again, GREEN has been diagnosed by Dr. Roitman as evidencing a NARCISSISTIC PERSONALITY DISORDER (NPD). (T)his NPD is essentially described in the clinical literature as a dramatic, emotional, erratic type or constellation of behaviors. Thus GREEN should be perceived by others and he would be expected to display in a host of different situations and settings, self-aggrandizing, self-absorbed with fantasies of perfection, exploitive and/or manipulative behavior(s). He would also be seen as typically being haughty, demanding adulation and expecting or feeling entitled to preferential treatment by others who would always be thought of as being less fortunate and privileged than him, in his interpersonal relationships.

In a 1993 letter submitted by his immediate supervisor in the Postal Service (1) GREEN is described in a manner that is the antithesis of a person evidencing NPD.

> "... professional in his appearance and demeanor. He has demonstrated to be a man of deep moral conviction, fortitude and determination.... He is

an extremely productive and conscientious worker. He is the type of individual that makes being a supervisor an enjoyable experience."

Similarly, in 1998 and 1999 letters (7 and 8) GREEN's manager-colleagues have praised his work performance.

"It was clear to me during his interview for the position that Mr. Green was well suited for the role of advocate.... Since assuming the position, he has lived up to that expectation and has won the praise of his co-workers as well as some of the utility representatives with whom he deals. All have described him as a talented and personable individual and a pleasure to work with. I echo those sentiments."

"... I have discovered a man of talent, expertise, warmth and compassion insofar as human interaction and relationships are concerned. Ron has a quiet, calm and reassuring personality interspersed with a wonderful sense of humor. I have not met very many people who have Ron's charisma.... I can assure you that as a former teacher, social worker and now government official, I am qualified to pass judgment on the intellect and character of my fellows."

"For one thing he is very intelligent and has a wide range of experience in dealing with the public and in resolving complex issues. Ron can converse easily with all types of personalities and can sort out problems and solve them.... Ron works well under pressure and can keep his wits even when a particular client or customer is agitated and upset. Ron has a professional bearing and

> appearance.... judgment, analysis, reflection, restraint, grit and endurance.... Ron is always willing to listen and help his colleagues."

OF NOTE, not one of GREEN's mental health evaluators and/or treating professionals (3-6) have indicated that he demonstrates an Axis II (NPD) condition. In Dr. Pike's 1993 evaluation he indicated "Axis II: 301.90. Personality disorder NOS with aspects of avoidant, schizoid and paranoid aspects." In his subsequent communications he lists "No disorder." Drs. Oates, Van Valkenburg and Zielinski do not cite any Axis II pathology in their reports.

The PSYCHOSOCIAL HISTORY provided by GREEN is entirely unremarkable, in my clinical opinion, for the actual precursors of character and personality disorder. GREEN did not allude to conduct and/or behavior problems, difficulties in adjustment during childhood and adolescence. His military career, U.S. Air Force, Sergeant (ES), September, 1970 - August, 1977, including an Honorable Discharge was not marred by either disciplinary actions, Non-Judicial Punishments, or Courts Martial. His employment history save for (t)his Postal Service friction has reportedly been conflict-free vis-a-vis distress in his interpersonal relationships. If GREEN is evidencing narcissistic traits these features reflect an average and expectable positive narcissism in the form of an appropriate pride in the accomplishments he's achieved thusfar. GREEN has not as far as I was able to determine ever been accused of excessive pridefulness.

GREEN was born and raised in Chicago, Illinois. He is the second child, the only male in a sibship of four. He is the product of a stable, middle class nuclear family. His mother died in 1993; his father died in September, 1995. OF INTEREST, GREEN's father lived with him for a

period of time following his wife's (mother's) death during which GREEN attended law school. GREEN thus acted/served as (t)his parent's caretaker in a, perhaps, selfless manner or gesture.

GREEN was said to have grown up in a ghetto neighborhood. His mother was a homemaker who "for a while" sold cosmetics as an independent entrepreneur. His father was a foundry worker who was also employed as a taxi driver in his second job. GREEN and his sisters have all achieved advanced education. Sibling rivalry was denied. OF NOTE, GREEN's mother was affected with Multiple Sclerosis and his oldest and youngest sisters suffer from this same disease state. His father reportedly died from the complications of respiratory problems.

As a youngster GREEN was said to have had bronchial asthma. Otherwise he was said to have had Usual Childhood Disease(s). He was said to have evidenced a single Neuropathic Trait Of Childhood, enuresis until about nine years old. GREEN commented that he did find himself to have been involved in some fighting between seven-eight years old, "defending" his sisters. He was said to have "... stuck pretty close to church ... treasurer for the Sunday School ... (Q/A) 11-12 years old." GREEN was said to have been in an "accelerated program" in both elementary school and high school. He is the first male in his family line to have graduated from high school, college and a graduate school.

> "I did the best I can to assist others.... I felt blessed with my mother and sisters having MS that I didn't."

IN SUM, GREEN was said to have been fully accepted by his neighborhood peers or chums. He remembered dating and having had an active social life. During high school he went to parties and was said to have been

known "as the life of the party." Sexual milestones including masturbation and intercourse were average range events, perhaps somewhat late given (t)his milieu. GREEN denied that he'd ever expected and/or demanded, felt entitled to, preferential treatment from his female partners.

In the Air Force GREEN was an "Avionics Instrument Technician." During his basic training he laughingly referred to himself as having been dubbed "the latrine queen." As such he was placed in charge of keeping that barracks area clean; he was in charge of a 10 man detail. "It was ajob with a great deal of responsibility and I just tried to do it." During (t)his basic training he was reportedly "a student leader." He was a "shift supervisor" following graduation from "tech school."

GREEN's U.S. Postal Service work performance has been documented and there is no reason to reiterate those alleged job stresses/stressors.

> "The Postal Service was the first time where I wasn't judged reasonably on my performance.... My ultimate goal is (was) to further myself through promoting organizational goals.... I work to live but I just don't live to work (referencing Dr. Roitman's reported commentary)!"

GREEN is presently in his fourth marriage, since 1995. His first marriage, 1971-1978, ended because he and his mate, "high school friends," were said to have "... outgrew each other." That union produced a (now) 28 year old daughter and 23 year old son. His second marriage, "August 1982 - November, 1983," was said to have been terminated because "she had a lot of problems gambling ... infidelity." His third marriage, 1985-1994, produced his (now) 13 year old daughter.

"She was too controlling.... I didn't have an opportunity to raise my children in my first marriage..., she, (t)his third wife, was pregnant ... when I realized she was controlling I attempted to stick around and make it work ... but I couldn't be the man ... father ... I wanted to be.... (QIA) no physical abuse in any of my marriages."

In the informal MENTAL STATUS EXAMINATION GREEN's RELATEDNESS was good humored and not especially bitter or hostile. He was portrayed to be a self-confident gentleman who sounded as if he was enduring (t)his frustration in a reasonably adult/mature fashion. That is, rather than becoming undone emotionally GREEN was said to realize that his task in this instance is to go about collecting or accumulating the data that unquestionably is in unanimous support of his position (reinstatement). In this connection and otherwise JUDGMENT and REASONING FACULTIES were fully functional, high level, intact. Here too INTELLECT was estimated to be HIGH AVERAGE. Also, GREEN showed himself to be articulate and well-spoken.

Given these capacities GREEN certainly impressed me as being able to engage in thoughtful planning. Therefore, he was seen to be able to anticipate the consequences of his acts. There was no indication that GREEN would be inclined to be impulsive and/or to go off on a tangent ranting and raving irrationally in reaction to (dis)stress.

GREEN's emotional status considering his reported prior bout of clinical depression was ENTIRELY UNREMARKABLE FOR SIGNS OF ANY MAJOR MOOD IMBALANCE. As noted, he was appropriately jovial with a well placed sense of the absurd. AFFECT was full-range and spontaneous. DRESS, GROOMING and PERSONAL HYGIENE were in a satisfactory state of

repair. GREEN carried an attache case in hand, perhaps as nothing more than a convenient container for his papers and other objects, but maybe as a symbol of consequence. However, this accessory did serve to compliment GREEN's image as that of an organized, professional man whose proverbial get-up-and-go remains available for a focused, energetic performance.

FORMAL PSYCHODIAGNOSTIC ASSESSMENT TECHNIQUES yielded findings that were entirely consistent with these clinical impressions. More specifically, GREEN was shown to be an emotionally balanced, intelligent individual who is an independent self-starter, someone who presents himself as having social sensitivity, social skills and proverbial social graces. There was nothing haughty about his attitudes or in the display of his intellect. GREEN's productions showed him to be appropriately sensitive. He revealed himself to be personally and socially competent. There was nothing here to suggest that this is a short-sighted, self-defeating, self-aggrandizing personality. In the Sentence Completion Test, for example, some of his responses include:

> "6. I used to feel I was being held back by 'MY OWN CHOICES.' 8. As a child my greatest fear was 'NOT BEING ALLOWED TO REACH MY FULL POTENTIAL.'
>
> 10. The ideal man 'MAINTAINS A BALANCE BETWEEN FULFILLING HIS OWN NEEDS AS WELL AS THOSE AROUND HIM.'
>
> 12. I was most depressed when 'I COULD NOT DEAL EFFECTIVELY WITH THE HOSTILITY DIRECTED AT ME.'
>
> 34. I was most annoyed when 'PEOPLE LIED JUST TO GET WHAT THEY WANTED.'

36. Taking orders 'FROM SOMEONE YOU RESPECT IS EASY.'

37. I dislike to 'BE TOLD TO DO SOMETHING UNFAIR OR UNETHICAL.'

41. If I can't get what I want, I 'ACCEPT WHAT I HAVE.'

42. When I am criticized, I 'LOOK TO SEE IF IT IS CONSTRUCTIVE OR MEAN- SPIRITED.'

49. People seem to think that I 'DON'T WORRY ABOUT ANYTHING.'

52. Most of all I want 'TO DO MY BEST.'

62. Responsibility 'IS AN ESSENTIAL CORNERSTONE FOR SUCCESS.'

73. People in authority are 'DUTYBOUND TO DO THE RIGHT THING.'

82. When I feel others don't like me 'I TRY TO FIND OUT WHY.'

84. Most people are 'HOPING FOR A WORLD OF PEACE & HARMONY.'

86. I could lose my temper if I ALLOWED OTHERS TO DICTATE MY RESPONSE.'

87. I am afraid of 'GIVING AND CARING TOO MUCH.'

95. Most men act as though 'THEY AREN'T AS SENSITIVE AS THEY REALLY ARE.'

100. I feel sad about 'THE ILLNESS THAT RUNS THROUGH MY, FAMILY.'"

The Multiaxial Diagnostic Inventory: Personality Scale is a criterion-referenced diagnostic screening instrument. This instrument is a checklist designed to indicate personality disordered (maladaptive) functioning. The

critical score or cut-off point for NARCISSISTIC PERSONALITY DISORDER is endorsement of five items. GREEN scored zero items. He did endorse one item on the Passive-Aggressive Personality Disorder subscale where the critical score is five.

"I tend to work slowly on jobs I don't want to do."

On the Hand Test, a projective instrument designed to assess violence and acting-out potential, GREEN was determined to have satisfactory ego-strength, intact defenses, and his potential for hostile-aggressive display was virtually nil. GREEN looks to be someone who is more inclined to use words rather than action or to engage in stunts of some sort to resolve conflict(s).

On both objective and projective tests GREEN produced a picture highlighting optimism, conscientious performance and an average-expectable reaction to the stresses of daily living (within a workplace environment).

The MMPI-2 clinical profile was "... within valid limits ... Content scales are within normal limits."

Similarly, on the MCMI-III GREEN did not obtain any clinically significant Axis I (clinical syndromes) or Axis II (personality disorder) scale scores. He was revealed to be evidencing character traits that took the form of Histrionic and Narcissistic Features.

TO CONCLUDE, nothing in this examination suggests that GREEN is evidencing either acute and chronic psychopathology or long-standing character and personality disorder. GREEN, in my clinical opinion, was revealed to be a competent individual. He is a fully intact gentle-man, with adequate ego-structure and a self-system characterized by reasonable, appropriate feelings of self-worth. There is nothing here to indicate that GREEN would stand-out as a reprehensible figure

amongstt his postal co-workers. In fact, GREEN probably has mucth to offer and/or to contribute in settings where he mightt be placed to work. GREEN, in my opinion, is in possessicon of sufficient abilities and resources to be able to performm all of the duties that would be assigned to him.

IN SUM, based upon these examination findings I can find no contraindications to GREEN's immediate reinstatememt with the U.S. Postal Service. GREEN's Global Assessment Of Functioning is deemed to be within the 81-90 range (DSM-IV): "ABSENT OR MINIMAL SYMPTOMS."

If II can provide additional enlightenment in GREEN's case please feel free to call upon me. In my professional judgment GREEN'S POSITIVE CLINICAL PICTURE stands on its own merits in terms of any interpretation that could be proffered based upon (t)his history and these findings. NO PSYCHOPATHOLOGY NOR FUNCTIONAL IMPAIRMENT was demonstrated. NO DISABLEMENT can, therefore, be established given these examination results.

Sincerely,

/s/ Marv A. Glovinsky

Marv A. Glovinsky, Ph.D., FACAPP, DABPS
Board Certified Forensic Medicine

MAG/cr

cc: David C. Bachman, M.D.
Ron Green

(2)

No. 03-1645

Supreme Court, U.S.
FILED
OCT 27 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

IN RE RONALD L. GREEN

On Petition For Writ Of Mandamus

PETITION FOR REHEARING

RONALD L. GREEN,
Petitioner, *In Proper Person*
2709 Prism Cavern Court
Henderson, NV 89052-3944
(702) 435-4584

INTRODUCTION

The decision of the Ninth Circuit should not be allowed to stand because it incorrectly suggests that discrimination claims brought under the Civil Rights Act of 1964, the Rehabilitation Act of 1973 and the Civil Service Reform Act are not entitled to a judicial trial *de novo* after those claims are first raised in an administrative proceeding.

In addition, the Ninth Circuit's decision should not be allowed to stand because it suggests a federal employer is above the law and can conduct an unlawful psychiatric examination to question and then penalize a federal employee for exercising his Constitutional and civil rights.

REASONS FOR GRANTING THE WRIT

I. AS A MATTER OF LAW, WHEN CONGRESS ACTS TO CONTROL THE CONDUCT OF THE FEDERAL GOVERNMENT, THE FEDERAL COURTS MUST FOLLOW THE WILL OF CONGRESS.

There is a disturbing trend in the federal courts to allow Government defendants, especially in cases of discrimination, to avoid liability for their unlawful conduct no matter how egregious. This trend has caused an erosion of public confidence in the rule of law and undermines the Constitution and the legal principles that have made this country great and kept it free.

The Rehabilitation Act passed by Congress and signed into law by the President prohibits a federal employer from discriminating against an applicant because he or she has a history of disability. (*School Board v. Arline*, 480 U.S. 273, 107 S. Ct. 1123, 1126-1127, (1987)). The Rehabilitation Act has not been repealed.

When Ronald L. Green ("Green") applied for re-employment with the United States Postal Service ("Postal Service") in 1997, it is undisputed that the Postal Service required Green to submit to a psychiatric examination only because he has a history of disability. No other applicant was required to submit to the examination that was also prohibited by, *inter alia*, the Office of Personnel Management ("OPM"). (5 C.F.R. § 339.301(e)).

Moreover, the Civil Rights Act that was also passed by Congress and signed into law by the President prohibits a federal employer from retaliating against an employee due to his or her protected activities. (5 U.S.C.S. § 2000e-3). The Civil Rights Act has also not been repealed.

It is undisputed that the Postal Service refused to rehire Green because its psychiatrist considered his prior protected activities and diagnosed Green has an alleged personality disorder that compels him to engage in Title VII and other Constitutionally protected activities. (Petition at A-70).

A private employer facing similar indisputable facts and similar charges under the Americans With Disabilities Act ("ADA") would have capitulated. However, the Postal Service, like other federal employers with their hands in the public purse and free representation by the public office of the United States Attorney, chose to take its chances and unnecessarily burden the overextended courts.

Despite the undisputed facts and the controlling law, the Postal Service chose to take its chances in federal court because it believed it could escape liability by manipulating the judicial system with erroneous and misleading arguments. Regrettably, it has done so.

The arguments were ethically impermissible because the agency and the United States Attorney knew or should have known that the discrimination claims at issue were entitled to a judicial trial *de novo* and the arguments for preclusion did not apply because the "statutory purpose to the contrary is evident." (*Astoria Federal Savings & Loan Association v. Solimino*, 501 U.S. 104, 108 (1991)).

Green's discrimination claims were entitled to a judicial trial *de novo* in federal district court under the Civil Rights Act, the Rehabilitation Act and the Civil Service Reform Act and the district court erred as a matter of law when it decided in favor of the Postal Service by applying res judicata based upon an administrative decision that dismissed the case for lack of subject matter jurisdiction and did not consider the discrimination claims at issue. It was further error for the Ninth Circuit to affirm the decision on collateral estoppel grounds and not consider the merits of the discrimination claims.

The Ninth Circuit and the district court did not follow and apply the controlling statutes and case law, including prior Supreme Court mandates requiring a judicial trial *de novo*, because the defendant in this case is a Government agency. And the Government has proffered no legally defensible position for its unlawful and discriminatory acts.

For these reasons, this Honorable Court should exercise its discretionary powers and grant the writ of mandamus because the Court's appellate jurisdiction is required in these exceptional circumstances where, only because the defendant is a Government employer, the courts below did not follow and apply the controlling law as required by the rule of law.

II. AS A MATTER OF LAW, A JUDICIAL DECISION THAT INFRINGES UPON THE CONSTITUTIONAL RIGHTS OF AN INNOCENT CITIZEN CANNOT STAND.

In the Civil Rights Act, the Rehabilitation Act and the Civil Service Reform Act, Congress provided a specific statutory process for adjudicating discrimination claims and that process includes the exhaustion of administrative remedies prior to a judicial trial *de novo* in federal district court. Congress specifically chose not to provide the Court of Appeals for the Federal Circuit ("Federal Circuit") jurisdiction over discrimination claims. (5 U.S.C.S. § 7703(b)).

Incredibly, in the administrative procedures below, the Merit Systems Protection Board ("Board") failed to consider the discrimination claims at issue when it dismissed the case for lack of subject matter jurisdiction. After it determined the Board had subject matter jurisdiction, the Federal Circuit failed to remand the case to the Board for a decision on the merits as the law requires. The Federal Circuit then exceeded its jurisdiction by considering the merits of a case involving unlawful discrimination. Thereafter, the district court and the Ninth Circuit failed to provide the judicial trial *de novo* required under the statutes. None of the aforementioned forums considered the merits of the discrimination claims at issue.

Because the procedural process prescribed by Congress under the referenced statutes was not followed and Green never received a full and fair opportunity to fully litigate the merits of the discrimination issues, his constitutional right to due process of law was violated.

In addition, because the district court required Green to file a second administrative complaint with the Postal

Service in order to exhaust his administrative remedies after the Board dismissed the case, but the district court failed to provide Green with the judicial trial *de novo* required under the statutes after he did so, Green's constitutional right to equal protection under the law was also violated.

However, perhaps the most egregious infringement of Green's constitutional rights occurred when the federal employer conducted the intrusive psychiatric examination that was already prohibited by, *inter alia*, OPM and the Rehabilitation Act.

The psychiatric examination was used as a pretext by the Postal Service in order to violate Green's right to be secure against an unreasonable search by making impermissible inquiries and then criticizing and penalizing Green for exercising his civil rights and his Constitutional right to freedom of speech and freedom to petition the Government for a redress of grievances. (Petition at A-70).

CONCLUSION AND REQUEST FOR RELIEF

WHEREFORE, because the procedural history clearly demonstrates the petitioner was denied the requisite judicial trial *de novo* required under the statutes and the courts below also failed to apply the controlling law to the undisputed facts, the Court should defend the Constitution and grant this petition and direct the Ninth Circuit to provide the judicial trial *de novo* and thereafter apply the controlling law to the undisputed facts in this case.

RESPECTFULLY SUBMITTED this 27th day of October, 2004.

RONALD L. GREEN
Petitioner, *In Proper Person*

CERTIFICATION

I hereby certify that this Petition for Rehearing is restricted to the grounds specified in paragraph 2 of Supreme Court Rule 44 and is submitted in good faith and not for delay.

Ronald L. Green